Supreme Court of the United States

OCTOBER TERM, 1942

No. 849

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,
PETITIONERS,

vs.

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

INDEX.

UNITED STATES OF AMERICA, DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.

versus No. 435 (Civil Action).

PHILIP J. CHARLET, etc.

Appearances:

Messrs. Deutsch & Kerrigan (Eberhard P. Deutsch), Ryan, Condon & Livingston, Attorneys for Plaintiffs-Appellants.

Messrs. W. C. Perrault, Asst. Atty. Gen., Aubrey B. Hirsch, General Counsel, Division of Employment Security, etc., Attorneys for Defendant-Appellee.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 24th day of March, 1942, at the City of New Orleans, Louisiana.

3 **PETITION.**

Filed August 22, 1940.

(Number and Title Omitted.)

To the Honorables, the Judges of the District Court of the United States in and for the Eastern District of Louisiana:

The complaint of Great Lakes Dredge & Dock Company, Jahncke Service, Inc., McWilliams Dredging Company, Standard Dredging Corporation (New York), Sternberg Dredging Company, United Dredging Company, Wilbanks & Pierce, Inc., and W. Horace Williams Company, Inc., with respect represents that:

First.

The status of each of the complainants is as follows:

(1) Great Lakes Dredge & Dock Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business in the City of Chicago, Illinois;

(2) Jahncke Service, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana, with its principal office and place of business in the City of New Orleans, in said State;

(3) McWilliams Dredging Company is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, Illinois, and a place of business and office in the City of New Orleans;

(4) Standard Dredging Corporation (New York) is a corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business in the City of New York.

(5) Sternberg Dredging Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri, and a place of business and office in the City of New Orleans;

(6) United Dredging Company is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of New York, New York, and an office and place of businesss in the City of New Orleans;

(7) Wilbanks & Pierce, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, with its principal office and place of business in the City of Bradenton, Florida, and an office and place of business in the City of New Orleans;

(8) W. Horace Williams Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Louisiana, with its principal office and place of business in the City of New Orleans.

Second.

Defendant, Philip J. Charlet, is Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, is domiciled in the City

of Baton Rouge, Parish of East Baton Rouge, Louisiana, and is charged with the administration and enforcement of the Louisiana Unemployment Compensation Law, which is Act No. 97 of the Legislature of Louisiana for the year 1936 as amended by Act No. 164 of 1938, Act No. 16 of the First Special Session of 1940, and Acts Nos. 10 and 11 of the Regular Session of 1940.

Third.

Complainants have, at various times, since before the year 1936, owned and operated dredging and other similar and appurtenant vessels on the navigable waters of the United States within the State of Louisiana, and have employed, and continue to employ, in connection with, and in furtherance of, said operations, officers and members of the crews of said vessels, including masters and other deck officers; engineers; pursers; levermen; quartermasters; mates; oilers; firemen; ship's machinists, blacksmiths, welders, carpenters and their helpers; stewards, cooks and mess boys; deckhands; shore men; tug captains, engineers, mates and deckhands; launch operators; bargemen; cabin boys; piledrivermen; and others.

Fourth.

As originally enacted, the Louisiana Unemployment Compensation Law provided in section 18(g)(6) that the term "employment" as used in that Act, did not include "Services performed as an officer or member of the crew of a vessel on the navigable waters of the United States". By Act 164 of 1938, effective July 27, 1938, the foregoing provision was changed, so that under section 18(g)(6)(c) of the statute, the term "employment" as used in the Law was to exclude:

"Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States

customarily operating between ports in this State and ports outside this State."

While most of complainants' vessels have frequently operated outside the State of Louisiana in various states and territories of the United States and in foreign countries, they do not otherwise customarily operate between ports in Louisiana and ports outside of Louisiana.

Fifth.

Complainants aver that in so far as the provisions of section 18(g)(6)(C) of the Louisiana Unemployment Compensation Law, quoted above, include within the term "employment" as used in that statute, the officers and members of the crews of vessels owned and operated by complainants on the navigable waters of the United States within the State of Louisiana, including masters and other deck officers, engineers, pursers, levermen, quartermasters, mates, oilers, firemen, ship's machinists, blacksmiths, welders, carpenters and their helpers, stewards, cooks and mess boys, deckhands, shore men, tug captains, engineers, mates and deckhands, launch operators, bargemen, cabin boys, piledrivermen, and others, said section is unconstitutional, null and void, and of no effect, as violative of the provisions of section 2 of the article 3 and section 8 of article 1 of the Constitution of the United States, giving to the Congress of the United States exclusive power to legislate in respect to matters within the admiralty and maritime jurisdiction of the United States, and depriving the states of all power to legislate with regard thereto.

Sixth.

Under the provisions of section 6 of the Louisiana Unemployment Compensation Law, employers are required

to pay contributions equal to nine-tenths of one (.9%) per cent of wages payable on employment covered by the statute during the year 1936; one and eight-tenths (1.8%) per cent of such wages for the year 1937; and two and seven-tenths (2/7%) per cent of all wages payable during the year 1938 and each calendar year thereafter. No such contributions have been paid by complainants herein on wages payable to the officers and members of the crews of their vessels while operating on the navigable waters of the United States within the State of Louisiana, except as to the so-called "shore men"; and except as to certain employees of plaintiff W. Horace Williams Company, Inc., for years prior to 1940.

Seventh.

Under the provisions of section 6 of the Louisiana Unemployment Compensation Law, up to the time of its amendment by Act No. 11 of 1940, effective June 30, 1940, each person in employment within the scope of said law was required to contribute one-half of one (½%) per cent of his wages, which his employer was required to withhold in trust and to transmit with his own contributions to the Commissioner (Administrator) charged with enforcement of the statute. No such deductions nor payments have been made by complainants with reference to the wages paid to the officers and members of the crews of their vessels operating on the navigable waters of the United States within the State of Louisiana, except as to the so-called "shore men"; and except as to certain employees of plaintiff W. Horace Williams Company, Inc., for years prior to 1940.

Eighth.

Under section 13 of the Louisiana Unemployment Compensation Law, contributions not paid when due there-

under bear interest at the rate of one (1%) per cent per month, plus a penalty of ten (10%) per cent attorneys' fees on both principal and interest; and said section of said statute contains further drastic provisions for the enforcement and collection of said amounts, by civil actions in the Courts of Louisiana, by distraint and by the recordation of liens and seizure and sale of real and personal property by summary proceedings, the burden of proof being always on the employer; and it is further provided in said section that issuance of any certificate of dissolution or of withdrawal from the state of any corporation shall be withheld pending payment of the amounts claimed.

Ninth.

Under the provisions of section 15 of the Louisiana Unemployment Compensation Law, penalties of fines of not less than $20 nor more than $200, and imprisonment for not less than ten nor longer than sixty days, or both such fine and imprisonment, are imposed for violations of said statute, and each representation or failure to disclose certain information required in connection with any attempt to avoid becoming or remaining subject to the Act, and each day any of the violations specified in said section of the Act continue, are deemed to be separate offenses.

Tenth.

Complainants aver that as long as said statute remains effective and has not been declared unconstitutional by the Courts, they are faced with possible harrassment by criminal prosecutions for alleged violations thereof, and by civil actions to recover contributions alleged to be due thereunder, with ever-accruing and increasing penal-

ties and interest, as well as possible future difficulties in the matter of certificates of dissolution or withdrawal, should occasion therefor arise; and complainants must either continue to pay contributions on the wages paid those members of the crews known as "shore men", or discontinue paying such contributions, and face at once criminal prosecutions and civil proceedings to enforce such payments with interest and penalties as hereinabove set forth.

Eleventh.

Complainants aver that while defendant has never admitted that section 18(g)(6)(C) of the Louisiana Unemployment Compensation Law is unconstitutional as herein alleged, defendant has advised complainants informally that he does not intend to enforce the provisions of said statute against them with reference to the employment of the officers and members of the crews of their dredging and similar and appurtenant vessels on the navigable waters of the United States within the State of Louisiana, except those who are carried as "shore men"; although, as complainants are advised, his immediate predecessor in office did enforce said statute as to such employees as evidenced by a letter addressed by him under date of February 3, 1940 to Gahagan Construction Corporation of Brooklyn, New York.

Twelfth.

Under section 25 of the Louisiana Unemployment Compensation Law, as added by Act No. 11 of 1940, the right of the Administrator to collect contributions, interest or penalties due for previous years under the statute, prior to its various amendments, is retained in effect; and if complainants should in future be required to pay contri-

butions which under the terms of the statute they should have deducted from wages paid to the officers and members of the crews of their vessels operating on the navigable waters of the United States within the State of Louisiana for prior years, they will not, in many instances, be able to recover from former employees whose whereabouts will no longer be known, nor even from many others, the amounts so required to be deducted and transmitted to defendant.

Thirteenth.

Complainants aver that the amount payable by each of them as contributions under said Louisiana Unemployment Compensation Law, at the time of the institution of this proceeding, if they should be required to pay said contributions with reference to their said maritime employments, would be in excess of three thousand ($3,000) dollars.

Wherefore complainants pray that Philip J. Charlet, Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, be duly cited to appear and to answer this complaint; and that, after due proceedings had, there be judgment herein in favor of complainants and against defendant, decreeing and declaring that the employees of complainants on their dredging and other similar and appurtenant vessels are officers and members of the crews of vessels on the navigable waters of the United States, and that the Louisiana Unemployment Compensation Law, and each of the provisions thereof, and particularly section 18(g)(6)(C) thereof, in so far as they seek to include within the term "employment" under said statute, services performed by the officers and members of the crews of complainants' vessels while operating on the navigable

waters of the United States within the State of Louisiana, including masters and other deck officers, engineers, pursers, levermen, quartermasters, mates, oilers, firemen, ship's machinists, blacksmiths, welders, carpenters and their helpers, stewards, cooks and mess boys, deckhands, shore men, tug captains, engineers, mates and deckhands, launch operators, bargemen, cabin boys, piledrivermen, and others, are unconstitutional, null and void; and for such other and further relief as equity, law and the nature of the case may require.

(Signed) EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH AND KERRIGAN,
Attorneys for Complainants.

1700 Hibernia Bank Bldg.,
New Orleans.

RYAN, CONDON & LIVINGSTON,
Of Counsel.
938 Continental Illinois Bank Bldg.,
Chicago, Illinois.

MOTION TO DISMISS, NOTICE THEREOF, AND PROOF OF SERVICE.

9 Filed September 11, 1940.

(Number and Title Omitted.)

Now into Court, through undersigned counsel, comes Philip J. Charlet, Administrator of the Division of Employment Security of the Louisiana Department of Labor, made defendant in the above entitled and numbered cause,

and without answering the allegations contained in the bill of complaint filed herein, moves the Court as follows:

I.

To dismiss the action because the complaint filed herein fails to state a claim upon which relief can be granted for the reason that the same does not set out a valid cause or right of action.

Wherefore, defendant prays, for the reason set out in this motion, that the suit filed herein by complainants be dismissed at their cost.

Defendant further prays for all necessary orders, decrees and for general and equitable relief.

(Signed) W. C. PERRAULT,
Assistant Attorney General,

(Signed) AUBREY B. HIRSCH,
General Counsel, Division of Employment Security, Louisiana Department of Labor, Attorneys for Defendant.

Address:
Capitol Annex,
Baton Rouge, Louisiana.

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10 NOTICE OF MOTION.

To Eberhard P. Deutsch of Deutsch & Kerrigan, 1700 Hibernia Bank Building, New Orleans, Louisiana, Attorney for Plaintiffs.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court, in the

District Court Room, in the Post Office Building at Baton Rouge, Louisiana, on the second Monday of November, 1940, at ten o'clock in the forenoon of that date, or as soon thereafter as counsel can be heard.

(Signed) W. C. PERRAULT,
(Signed) AUBREY B. HIRSCH,
Attorneys for Defendant.

Address:
Capitol Annex,
Baton Rouge, Louisiana.

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11 PROOF OF SERVICE.

We hereby certify that a copy of the above and foregoing motion and notice has this day been served on Eberhard P. Deutsch of Deutsch and Kerrigan, 1700 Hibernia Bank Building, New Orleans, Louisiana, attorney for Plaintiffs, by mailing it to him at 1700 Hibernia Bank Building, New Orleans, Louisiana.

Baton Rouge, Louisiana, September 10th, 1940.
(Signed) W. C. PERRAULT,
(Signed) AUBREY B. HIRSCH,
Attorneys for Defendant.

Address:
Capitol Annex,
Baton Rouge, Louisiana.

12

ANSWER.

Filed November 15, 1940.

(Number and Title Omitted.)

To the Honorable, the Judges of the District Court of the United States in and for the Eastern District of Louisiana:

Now into this Honorable Court, through his undersigned counsel, comes Philip J. Charlet in his official capacity as Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, and with reservation of all of his rights under his Motion to Dismiss the plaintiffs' complaint heretofore filed herein and presently pending, save and except his right to cause said motion to be disposed of in advance of the merits of this cause, for answer to plaintiffs' complaint denies all and singular the allegations thereof except those hereinafter specially admitted, and now answering said complaint, article by article, avers and says:

I.

Respondent admits the allegations of the first article of plaintiffs' complaint.

II.

Respondent admits the allegations of the second article of said complaint.

III.

Respondent admits the allegations of the third article of said complaint.

IV.

Respondent admits the allegations of fact contained in the fourth article of said complaint and avers that the statutes mentioned in said article speak for themselves.

V.

Respondent denies the allegations of the fifth article of said complaint.

VI.

Respondent avers that the statute referred to in the sixth article of said complaint speaks for itself, but he has no knowledge of the facts alleged in said article and hence denies same.

VII.

Respondent avers that the statute referred to in the seventh article of said complaint speaks for itself, but he has no knowledge of the facts alleged in said article and hence denies same.

VIII.

Respondent avers that he is not required to answer the allegations of the eighth article of said complaint dealing with the contents of the statute mentioned therein.

IX.

Respondent avers that the statute referred to in the ninth article of said complaint speaks for itself.

X.

Respondent avers that the statute referred to in the tenth article of said complaint speaks for itself.

XI.

Answering the eleventh article of said complaint, respondent denies that he ever advised complainants of his intention not to enforce the provisions of the statute referred to in any respect and avers that he intends to and has always intended to enforce each and every provision of the same, as he is charged by law to do; that he has no discretion in the enforcement of said statute and has no authority to waive any of its provisions; and he admits that his predecessor in office, as he intends to do, enforced the provisions of said statute as to all of the employees mentioned in plaintiffs' complaint, inclusive of the "shore men".

XII.

Except as to the recital of the contents of the statute referred to in the twelfth article of said complaint, which he is not required to answer, respondent denies the allegations thereof for lack of information sufficient to justify a belief with respect thereto, and he avers that the obligations imposed upon the complainants by said statute are in no way affected by the alleged inability of said complainants to recover from their former employees amounts due the Division of Employment Security of the Department of Labor of the State of Louisiana, which may not have been but should have been deducted from their wages by said complainants.

XIII.

Respondent admits the allegations of the thirteenth article of said complaint.

XIV.

Further answering said complaint, respondent avers that there is on file herein a statement of facts agreed upon by the attorneys for plaintiffs and respondent herein respecting the character of the operations carried on by plaintiffs' dredges and auxiliary water-craft, the duties performed by the employees engaged in such operations, and other pertinent facts.

Wherefore, respondent prays that plaintiffs' complaint be dismissed at their cost.

(Signed) W. C. PERRAULT,
Second Assistant Attorney General of the State of Louisiana,

(Signed) AUBREY B. HIRSCH,
General Counsel, Division of Employment Security, Department of Labor of the State of Louisiana,

(Signed) E. V. BOAGNI,
Attorney, Division of Employment Security, Department of Labor of the State of Louisiana,
Attorneys for Respondent.

Baton Rouge, Louisiana, November 13, 1940.

I, Aubrey B. Hirsch, one of the attorneys for the respondent in the foregoing answer, certify that a copy of said

answer has this day been served on Hon. R. E. Kerrigan, of the firm of Deutsch and Kerrigan, opposing counsel herein, by mailing the same to him at the office of said firm at 1700 Hibernia Bank Building, New Orleans, Louisiana.

(Signed) AUBREY B. HIRSCH.

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15 STIPULATION.

(Number and Title Omitted.)

Filed Dec. 12, 1940.

The following facts are hereby stipulated by and between plaintiffs and defendant, through their undersigned counsel of record in this cause.

I.

The employees referred to in plaintiffs' complaint are employed in the navigation and operation of floating hydraulic, clam shell, dipper and hopper dredges, pile drivers, quarter boats, tugs, launches, barges, and other and appurtenant vessels, used for deepening, widening, improving, extending and cleaning navigable channels and other navigable waters in this State, and for creating fill and other similar operations.

II.

Each of the dredges involved has a deck, companionways, an operating bridge, engine room, the usual ship's galley and mess hall, lazarette, holds, hatchways, bilges, double bottom tanks and compartments for fuel, water,

supplies and equipment. They are equipped with quarters which are used by the officers and the members of the crew, and by governmental officials when on board. The dredges carry extensive supplies of machinery and parts, fuel, boats, food, water, and, in varying degrees, all the other forms of equipment, stores and supplies with which all vessels are ordinarily outfitted.

III.

The engine room of each of the dredges is outfitted with marine boilers, pumps, light plant, dynamos and machinery. Some of the dredges are self-propelled. The only difference between the engine room of a hydraulic dredge and that of an ocean-going cargo or passenger vessel is that in the former, the main engine rotates an impeller, and in the latter, a propeller. The impeller is the rotating portion of the main pump.

IV.

Dredges which are not self-propelled are towed from place to place. Many such voyages extend from one state and country to another, frequently over the high seas. In voyages from one scene of operations to another, just as during operations, the dredge and each of the other vessels involved in this cause transports her crew, machinery, equipment, fuel and supplies. On such voyages, the dredge is under command of her master and is manned by her regular officers and crew, just as when dredging.

V.

Dredges which are not self-propelled have the ability to move themselves to a limited extent. This is done by the use of their swinging wires, swinging anchors and

spuds. Swinging wires extend from the bow of the dredge, and are attached to swinging anchors located several hundred feet to port and starboard. On the stern of each dredge are located two spuds, which are long sections of fabricated steel rounded with wooden members, or steel cylinders filled with concrete. These spuds are held upright in keepers at the stern of the dredge, so that they may be manipulated up and down. A spud may be dropped so that its lower end, which is pointed, is embedded in the earth at the bottom of the water, thus serving as a pivot on which the dredge swings. Only one of the spuds is lowered at a time. By manipulating her swinging wires in coordination with her spuds a dredge swings back and forth from port to starboard while dredging. The arc thus inscribed in the operation of the dredge is sometimes as long as four hundred feet or more. In operating in the foregoing manner, a dredge may move forward as much as two thousand feet per day. A dredge may also move forward by manipulating her swinging wires and anchors. She cannot engage in dredging while stationary. She can dredge only while in motion and afloat as described in this paragraph. Some dredges operate with the use of navigational compasses.

VI.

A hydraulic dredge operates through the use of a rotary cutter at the end of a ladder attached to the bow of the dredge. This cutter digs material at various depths through the raising and lowering of the ladder. The material so dug is transported by means of a suction pump through a large pipe line to designated places of deposit either on the water in which the operations are being carried on, or ashore. The floating pipe line is supported by pontoons.

VII.

A hopper dredge operates by drawing material through a large pipe by means of suction and depositing it on board the vessel. The water in the dredged material is then pumped away or allowed to flow overboard, and the material is then transported elsewhere for disposal.

VIII.

Clam shell and dipper dredges are similar in all respects to hydraulic dredges, except that they dig material through the raising and lowering of a large bucket-like apparatus. The former raises and lowers the bucket by means of cables, while the latter moves its bucket by raising and lowering the arm to which the bucket is attached. The material thus dug is deposited on barges and transported away, or the bucket, while full, is swung away from the place of digging, and the material is released.

IX.

A dredge customarily has an auxiliary fleet consisting of two or more tugs, two or more motorboats, fuel barges, equipment barges, a derrick barge, a dragline barge, numerous skiffs and many pontoons. The tugs are used to tow the dredge, barges and pontoons, and the motorboats are used to transport the officers and crew between ship and shore and to carry supplies to the dredge. As their names indicate, the fuel barges are used for transporting and storing fuel, and the equipment barges are used to transport pipe and other equipment needed in the dredging operations. The derrick and dragline barges are used to transport derricks and draglines, and to move and handle pipe, anchors and other heavy equipment.

X.

The attached photographs and photostats, marked Plaintiffs' Exhibits A to N, inclusive, show a typical hydraulic dredge owned by one of the plaintiffs herein, her enrollment and license, and her classification certificate of seaworthiness issued by the American Bureau of Shipping.

XI.

Floating pile drivers are similar to the other craft described herein in construction, equipment, personnel and operation, except that they function only in marine pile driving operations.

XII.

All the dredges and other vessels involved in this litigation are enrolled as vessels of the United States and licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce to engage in the coasting trade.

XIII.

The personnel of the dredge consists of the following complement of officers and crew: The master, commonly referred to as captain; first officer, generally called deck captain; purser, sometimes called paymaster; four mates; twelve or more deck hands; a chief engineer; three assistant engineers; fourth assistant engineer, sometimes called handyman; three or more engine room oilers; one to three deck oilers; three or more firemen; four levermen; a machinist and one or more helpers; a welder and one or more helpers; a ship's carpenter and helper; an electrician

and helper; a chief steward, two or more cooks; three or more messboys; one or more cabin boys and one or more motorboat operators; four or more tug captains; and four or more tug mates or engineers; shore foreman and crew.

XIV.

The duties of the officers and members of the crew of the dredges are as follows:

(a) The master is in complete charge of the dredge and issues all orders relative to her navigation and dredging operations. He is responsible for the safety of the personnel and for the safety of the dredge.

(b) The first officer, or deck captain, sees to it that the captain's orders are carried out. He conveys these orders to the levermen who navigate and operate the dredge, to the mates in charge of the deck hands and to the engineer in charge of the engine room.

(c) The purser handles the usual duties of a ship's purser. He is the fiscal officer managing all finances, keeping time records, payrolls and operations logs.

(d) The chief engineer is responsible for the proper functioning of all machinery on board. An assistant engineer is on duty on each of the watches and supervises the work of the oilers in the engine room and the firemen in the boiler room.

(e) The mates are in charge of the various watches on deck. They supervise the work of the deck hands, which consists of the customary deck hand duties, such as scrubbing, chipping, painting, manipulating lines and

pontoons, manning life boats, dropping and weighing anchors, and assisting generally in the operation and navigation of the dredge and the other craft involved in this litigation.

(f) The ship's carpenter, machinist, welder, electrician and their helpers, perform the duties which their designations indicate.

(g) The steward is responsible for the food served, planning of the meals, the supplying and condition of the galley and mess hall. Four regular meals are provided daily for the officers and crew aboard the dredge, and coffee and light food are available at all hours. The cooks prepare the meals assisted by the mess boys, who also act as waiters. The cabin boys, who attend to the quarters of the men, are also under the supervision of the steward.

(h) The tug captains are in charge of the tugs and supervise the work of their deck hands and engineers, and deck hands on the other craft, in assisting the dredge to maneuver, in towing fuel and water barges to and from sources of supply, in moving other equipment, barges, and sections of floating pipe and pontoons.

(i) The motorboat operators maneuver and are in charge of the motorboats which transport the vessel's personnel and some minor supplies between ship and shore. The tugs are also sometimes used for these purposes.

(j) When a hydraulic dredge does not deposit the dredged material at another location in the water in which it is operating, it deposits such material on shore or on an island known as a spoil bank. In such cases, the pipe line runs from the dredge over the water to

and along the spoil bank being supported over the water by pontoons. The operation and handling of the pipe line on shore is in charge of a foreman and five assistants, who have ten or more employees under their supervision. Their duties are to locate and lay the pipe line over the land and keep it in working order; to extend the pipe line as occasion requires to distribute the dredged material flowing from its end; and to dismantle the pipe line and assemble its constituent parts. The shore crew may not ordinarily live aboard ship, but they are frequently maintained aboard quarter boats. If more than a day or two are required for the dredge to go from one place of operations to another, the shore crew is usually discharged when operations are discontinued at the first place, and re-employed when operations are commenced at the second place.

XV.

The work aboard the vessel is divided into various watches depending on circumstances and individual situations.

XVI.

Many of the officers aboard the dredges, while not always under strict requirements in that regard, hold federal licenses. By training and experience, and the nature of the work and services rendered, the officers and crew of a dredge are required to meet the same physical, mental and disciplinary standards, and to perform functions similar to those required of any other seamen. They are afforded the facilities of the U. S. Marine Hospitals, the same as any other seamen.

XVII.

The vessels involved in this litigation do not customarily operate between ports in this state and ports outside of this state.

XVIII.

All of said employees are paid wages of varying amounts.

(Signed) DEUTSCH & KERRIGAN,
(Deutsch and Kerrigan)
Attorneys for Plaintiffs,

(Signed) W. C. PERRAULT,
(W. C. Perrault)
Assistant Attorney General
of Louisiana,
and

(Signed) AUBREY B. HIRSCH,
(Aubrey B. Hirsch)
General Counsel, Division of
Employment Security,
Louisiana Department of
Labor,
Attorneys for Defendant.

RYAN, CONDON & LIVINGSTON,
Of Counsel.

22 ORDER TRANSFERRING CASE TO NEW ORLEANS DIVISION.

Filed December 12, 1940.

(Number and Title Omitted.)

On motion of plaintiffs and defendant, through their undersigned attorneys of record herein:

It Is Ordered By The Court that this case be, and the same hereby is, transferred to the New Orleans division of this Court.

(Signed) A. J. CAILLOUET,
Judge.

December 12th, 1940.

(Signed) R. EMMETT KERRIGAN,
DEUTSCH & KERRIGAN,
Attorneys for Plaintiffs,
W. C. PERRAULT,
Second Assistant Attorney General of the State of Louisiana,
AUBREY B. HIRSCH,
General Counsel, Division of Employment Security, Department of Labor of the State of Louisiana,
E. V. BOAGNI,
Attorney, Division of Employment Security, Department of Labor of the State of Louisiana.

23

OPINION.

Filed March 17, 1942.

United States District Court, Eastern District of Louisiana, New Orleans Division.

Great Lakes Dredge & Dock Company, Jahncke Service, Inc., McWilliams Dredging Company, Standard Dredging Corporation (New York), Sternberg Dredging Company, Wilbanks & Pierce, Inc., United Dredging Company and W. Horace Williams Company, Inc., Plaintiffs,

versus No. 435 Civil Action.

Philip J. Charlet, Administrator, Division of Employment Security, Louisiana Department of Labor, Defendant.

Messrs. Deutsch & Kerrigan, Eberhard P. Deutsch, New Orleans, Louisiana

and

Ryan, Condon & Livingston, Chicago, Illinois, for Plaintiffs.

Mesrs. W. C. Perrault, Asst. Atty. Gen., Baton Rouge, Louisiana,

and

Aubrey B. Hirsch, General Counsel, Division of Employment Security, etc., Baton Rouge, Louisiana, for Defendant.

CAILLOUET, J.

The eight plaintiffs herein are all engaged in the dredging business.

They seek a declaratory judgment against the Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana who is officially charged with the enforcement and administration of the Louisiana Unemployment Compensation Law, or Act 97 of 1936, which has been amended by Act 164 of 1938, Act 16 of the First Special Session of 1940 and Acts 10 and 11 of 1940.

As Section 18 of the statute originally read, there was excepted (—Sec. 18 (6) (g) (7)—) from the term "employment", as defined therein, any service "performed as an officer or member of the crew of a vessel on the navigable waters of the United States."

Under the amendment by Act 164 of 1938, this verbiage was changed into that which subsists until the present, so that the particular service excepted under Section 18 (g) (6) (C) is that "performed as an officer or member of the crew of a vessel on the navigable waters of the United States *customarily operating between ports in this State and ports outside this State*". (Italics supplied.)

The plaintiffs contend that insofar as this provision operates an inclusion, within the "employment" defined by the statute, of the crew, officers and members of vessels owned and operated by them within the State of Louisiana, Section 18 is null, void and of no effect as violative of Section 2 of Article 3 and Section 8 of Article 1 of the Constitution of the United States; which constitutional provisions, plaintiffs aver, vest Congress with the exclusive power to legislate concerning matters within the admiralty and maritime jurisdiction of the United States and deprive the States of all power to legislate relative thereto; and plaintiffs pray that there be rendered a declaratory judgment so decreeing the claimed unconstitutionality.

A motion to dismiss the action for the alleged reason that the complaint fails to state a claim upon which re-

lief can be granted because it does not set out a valid cause or right of action was first filed and was followed by the defendant's answer, but with full reservation of all rights under said motion to dismiss.

The defendant asserts his intention to officially enforce each and every provision of the law under attack and avers that an agreed statement of facts is on file in the record, wherefrom one may determine the character of the operations carried on by the plaintiffs, etc.

The matter was submitted to the Court upon such stipulation, which includes the following pertinent statements of fact, to-wit:

I.

"The employees referred to in plaintiffs' complaint are employed in the navigation and operation of floating hydraulic, clam shell, dipper and hopper dredges, pile drivers, quarter boats, tugs, launches, barges, and other and appurtenant vessels, used for deepening, widening, improving, extending and cleaning navigable channels and other navigable waters in this State, and for creating fill and other similar operations.

* * *

IV.

Dredges which are not self-propelled are towed from place to place. Many such voyages extend from one state and country to another, frequently over the high seas. In voyages from one scene of operation to another, just as during operations, the dredge and each of the other vessels involved in this cause transports her crew, machinery, equipment, fuel and supplies. On such voy-

ages, the dredge is under command of her master and is named by her regular officers and crew, just as when dredging.

* * *

IX.

A dredge customarily has an auxiliary fleet consisting of two or more tugs two or more motorboats, fuel barges, equipment barges, a derrick barge, a dragline barge, numerous skiffs and many pontoons. The tugs are used to tow the dredge, barges and pontoons, and the motorboats are used to transport the officers and crew between ship and shore and to carry supplies to the dredge. As their names indicate, the fuel barges are used for transporting and storing fuel, and the equipment barges are used to transport pipe and other equipment needed in the dredging operations. The derrick and dragline barges are used to transport derricks and draglines, and to move and handle pipe, anchors and other heavy equipment.

* * *

XII.

All the dredges and other vessels involved in this litigation are enrolled as vessels of the United States and licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce to engage in the coasting trade.

* * *

XIII.

The personnel of the dredge consists of the following complement of officers and crew: The master, commonly referred to as captain; first officer, generally called deck

captain; purser, sometimes called paymaster; four mates; twelve or more deck hands; a chief engineer; three assistants engineers; fourth assistant engineer, sometimes called handyman; three or more engine room oilers; one to three deck oilers; three or more firemen; four levermen; a machinist and one or more helpers; a welder and one or more helpers; a ship's carpenter and helper, an electrician and helper; a chief steward, two or more cooks; three or more messboys; one or more cabin boys and one or more motorboat operators; four or more tug captains; and four or more tug mates or engineers; shore foreman and crew.

XIV.

The duties of the officers and members of the crew of the dredges are as follows:

(a) The master is in complete charge of the dredge and issues all orders relative to her navigation and dredging operations. He is responsible for the safety of the personnel and for the safety of the dredge.

(b) The first officer, or deck captain, sees to it that the captain's orders are carried out. He conveys these orders to the leverman who navigate and operate the dredge, to the mates in charge of the deck hands and to the engineer in charge of the engine room.

(c) The purser handles the usual duties of a ship's purser. He is the fiscal officer managing all finances, keeping time records, payrolls and operations logs.

(d) The chief engineer is responsible for the proper functioning of all machinery on board. An assistant engineer is on duty on each of the watches and supervises

the work of the oilers in the engine room and the firemen in the boiler room.

(e) The mates are in charge of the various watches on deck. They supervise the work of the deck hands, which consists of the customary deck hand duties, such as scrubbing, chipping, painting, manipulating lines and pontoons, manning life boats, dropping and weighing anchors, and assisting generally in the operation and navigation of the dredge and the other craft involved in this litigation.

(f) The ship's carpenter, machinist, welder, electrician, and their helpers, perform the duties which their designations indicate.

(g) The steward is responsible for the food served, planning of the meals, the supplying and condition of the galley and mess hall. Four regular meals are provided daily for the officers and crew aboard the dredge, and coffee and light food are available at all hours. The cooks prepare the meals assisted by the mess boys, who also act as waiters. The cabin boys, who attend to the quarters of the men, are also under the supervision of the steward.

(h) The tug captains are in charge of the tugs and supervise the work of their deck hands and engineers, and deck hands on the other craft, in assisting the dredge to maneuver, in towing fuel and water barges to and from sources of supply, in moving other equipment, barges, and sections of floating pipe and pontoons.

(i) The motorboat operators maneuver and are in charge of the motorboats which transport the vessel's personnel and some minor supplies between ship and shore. The tugs are also sometimes used for these purposes.

(j) When a hydraulic dredge does not deposit the dredged material at another location in the water in which it is operating, it deposits such material on shore or on an island known as a spoil bank. In such cases, the pipe line runs from the dredge over the water to and along the spoil bank being supported over the water by pontoons. The operation and handling of the pipe line on shore is in charge of a foreman and five assistants, who have ten or more employees under their supervision. Their duties are to locate and lay the pipe line over the land and keep it in working order; to extend the pipe line as occasion requires to distribute the dredged material flowing from its end; and to dismantle the pipe line and assemble its constituent parts. The shore crew may not ordinarily live aboard ship, but they are frequently maintained aboard quarter boats. If more than a day or two are required for the dredge to go from one place of operations to another, the shore crew is usually discharged when operations are discontinued at the first place, and re-employed when operations are commenced at the second place.

* * * *

XVI.

Many of the officers aboard the dredges, while not always under strict requirements in that regard, hold federal licenses. By training and experience, and the nature of the work and services rendered, the officers and crew of a dredge are required to meet the same physical, mental and disciplinary standards, and to perform functions similar to those required of any other seamen. They are afforded the facilities of U. S. Marine Hospitals, the same as any other seamen.

XVII.

The vessels involved in this litigation do not customarily operate between ports in this state and ports outside of this state.

XVIII.

All of said employees are paid wages of varying amounts."

It is conceded by the plaintiffs that the Louisiana Unemployment Compensation Statute is broad enough in its terms to cover the employment of all of their respective employees, but they seek to avoid the effect of such coverage by contending that the Legislature's enactment of the statute, so as to make the law applicable to the particular employments at issue, constituted an invasion of a field of legislation reserved exclusively to Congress by the Federal Constitution.

On the other hand, the defendant's position is, in effect, that the Louisiana statute does no more than levy a non-discriminatory excise tax based upon the exercise of the privilege of employing individuals measured by the wages paid; the right to impose which undoubtedly existed prior to the adoption of the Constitution and was never surrendered by the several states. Defendant further urges, substantially, that said Louisiana Unemployment Compensation Law in no manner changes, modifies or affects the rights, duties or obligations of parties to maritime contracts, nor contravenes the essential purpose of any act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations.

For the present purposes it may be assumed, though it is not decided, that all of the employments at issue are maritime in character and within admiralty jurisdiction.

Plaintiffs, in support of their contention that the Louisiana Unemployment Compensation Act (insofar as its provisions cover such employment) is violative of the Constitution of the United States, place great reliance upon the Workmen's Compensation cases, wherein the United States Supreme Court held that State Compensation statutes may not be applied to seamen in the face of the settled doctrine that Congress is vested with paramount power to fix and determine the maritime law which shall prevail throughout its nation; and that no state legislation is valid which "works material prejudice to the characteristics features of the general maritime law or interferes with the proper harmony and uniformity of the law".

Southern Pacific Company v. Jensen, 2444 U. S. 205, 27 S. Ct. 524 (1917);

Knickerbocker Ice Co., v. Stewart, 253 U. S. 149, 40 S. Ct. 438 (1920);

Washington v. Dawson, 264 U. S. 219, 44 S. Ct. 302 (1924)

In the Southern Pacific v. Jensen case, the Supreme Court said of the remedy attempted to be provided (against their employers) to injured employees engaged in longshoremen's work, under the New York State Compensation Law, that it was a remedy of such character as was wholly unknown to the common law, incapable of being enforced by the *ordinary* processes of *any* Court, and not saved to suitors from the grant of exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction vested in the Federal District Courts. 28 U. S. C. A. 41 (3).

The Knickerbocker Ice Co., v. Stewart case involved the attempt of Congress to alter the grant to United

States District Courts of exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, by adding to the saving clause, i. e. "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it", the following words, viz: "and to claimants the rights and remedies under the workmen's compensation law of any state."

After a review of the Southern Pacific Company vs. Jensen case and others, said the Supreme Court (40 S. Ct. p. 440):

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."

Observing that Congress, by so amending the saving clause aforementioned, had evidently sought to permit application of state compensation laws to injuries sustained by employees within admiralty and maritime jurisdiction, and to circumvent the objection to such an application, which had been pointed out by the Southern Pacific Co. vs. Jensen case, the Supreme Court held that Congress

could not delegate its power of legislation on the subject to the several states.

In Washington vs. Dawson, supra, the immediate question presented was whether the defendant stevedoring business, in the operation of which its employees worked only upon ships in navigable waters, could be compelled to contribute to the accident fund established by the Industrial Insurance Act of the State of Washington, which provided for workmen's compensation.

The state statute, under its terms, was made applicable to employers and workmen engaged in maritime work or occupation *only* to the extent that the payroll of such workmen was clearly separable from the payroll covering workmen employed under circumstances in which liability did or might exist in the United States Courts of Admiralty; and the State Supreme Court (122 Wash. 572, 582, 211 Pac. 1059) held, under authority of Southern Pacific Co. vs. Jensen and Knickerbocker Ice Co. vs. Stewart, supra, that the Industrial Insurance Department had no right to collect a percentage of the defendant's payroll, since the bringing of such employer within the provisions of the Act "would work material prejudice to the characteristic features of the general maritime law, and interfere with the proper harmony and uniformity of that law in its international and interstate relations."

It was contended by the State in the U. S. Supreme Court (as in the State Court), that the objections to the requirement of such contributions in support of workmen's compensation statutes, which had been previously pointed out by the two just mentioned cases, were removed by the Act of Congress of June 10, 1922, c. 216, 42 Stat. 634. (See 41 (3), 28 U. S. C. A.).

However, the State decision under review was affirmed by the Court specifically on authority of its aforementioned earlier decision in Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834.

Counsel for the State of Washington contended that the doctrine enunciated by the Supreme Court in Southern Pacific Co. vs. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, and in Knickerbocker Ice Co., vs. Stewart, supra, was modified by subsequent decisions of the Court, i. e. Western Fuel Co. vs. Garcia, 257 U. S. 233, 42 Sup. Ct. 89, 66 L. Ed. 210, Grant-Smith Porter Ship Co. vs. Rhode, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321, and Industrial Commission vs. Nordenholt Co., 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933.

The Court, after reviewing each of said cases, held that none of them departed from the doctrine laid down in Southern Pacific Co. vs. Jensen and Knickerbocker Ice Co., vs. Stewart, and that the provisions of the Act of June 10, 1922, whereby there was given "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any state"—which rights and remedies were thereby made exclusive—could not be reconciled with such doctrine; the opinion specially calling attention to the fact that Congress, by the enactment referred to, had not exercised its undoubted power to amend, alter or revise the maritime law by legislation of general application, but had definitely manifested its intention to permit any state to alter the maritime law in such manner as best suited its own purposes,—a procedure which, necessarily, opened the door to the establishment of conflicting requirements, engendering resultant confusion and difficulties and destroying the uniformity that had been sought when the law of the sea was adopted by the Constitution as the measure of maritime rights and obligations.

These decisions, which are so relied on by plaintiffs, all emphasize the salient fact that the Courts were there dealing with situations involving the attempted substitu-

tion by state legislation of different rules for the governing of the relationships existing between employers and employees under contracts of maritime employment; from the language of each statute at issue, there stood out in bold relief the definite purpose of materially altering the rights and obligations of the parties to a maritime contract.

The decreed invalidity of the Workmen's Compensation Laws involved in said Supreme Court decisions just referred to, was based, in each instance, upon the Court's ascertainment of the fact that the state statute under attack actually impinged upon the essential features of the substantive maritime law; that substantial modification or complete displacement of right, obligation, liability, or remedy for maintenance and enforcement thereof, was attempted by statutory enactment, not of Congress, but of state legislature.

In no case, however, did the Supreme Court avoid a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty.

Red Cross Line vs. Atlantic Fruit Company, 264 U. S. 109, 44 S. C. R. 274 (1924).

Plaintiffs contend that a clear and direct analogy exists between the tax to create a state Workmen's Compensation Fund and the tax here at issue; and they reason that, because the Supreme Court held (in the cited workmen's compensation cases upon which they so rely) that permitting the operation of the state statutes *there* under examination would effect an invasion of the uniformity in respect to maritime matters which the Federal Constitution had sought to establish, it should now be decided, in effect, that the Louisiana Unemployment Compensation Act similarly "works material prejudice to the characteristic features of the general maritime law" and "interferes with the proper harmony and uniformity of the law."

Each one of the Workmen's Compensation statutes that were decreed illegal by the Supreme Court did materially alter the rights and obligations of employers and employees under maritime contracts; and disturbed, substantially, the desired uniformity which the Federal Constitution had sought to firmly establish. These state statutes all had for their definite purpose the prescribing of rights and liabilities of employers and employees in cases of maritime injuries, and thus did clearly invade and trench upon the exclusive field of admiralty, and the factual set-up in each case wherein invalidity of state statute was so decreed, reflected the working of material prejudice to the characteristic features of the general maritime law, and *not*, by way of exception to the general rule, simply a matter of mere local concern, with reference to which the rules of maritime law might be validly modified or supplemented by state legislation.

In this connection, see:

Union Fish Co. vs. Erickson, 248 U. S. 308, 39 Sup. Ct. 112 (1919);
Grant Smith-Porter Ship Co. vs. Rohde, 257 U. S. 469, 42 Sup. Ct. 157 (1922).

The Louisiana Unemployment Compensation Law does not, in the remotest degree, seek to directly affect the relationship inter se of the employer and employee under a maritime contract. The employment agreement in its terms and operating influence, and, particularly, the rights, obligations and liabilities of the parties contractant one to the other, all remain untouched and unchanged and still wholly under the aegis of admiralty law; no subtraction, addition or substitution takes place.

There is no question, here, of placing "the rules and limits of maritime law under the disposal and regulation"

of Louisiana and its unemployment compensation statute works no destruction of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States", as the Supreme Court held can not be permitted, in The Lottawanna (Rodd v. Heartt et al), 21 Wll. 558, 22 L. ed. 654 (at 662).

The Louisiana Unemployment Compensation Act prescribes that each employer shall pay contributions equal to certain specified percentages of wages as are "payable by him with respect to employment". Such contributions find their way into the state Unemployment Compensation Fund, which is administered by the Commissioner, and from said fund is paid unemployment compensation to unemployed workers in the manner and under the circumstances reflected by the statute terms.

Section 1 of the Act embodies a declaration of state public policy, reading thus:

"As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burdens which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintain-

ing purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefcre, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons."

That a state may raise funds by taxation in aid of its general welfare admits of no doubt.

Carmichael vs. Southern Coal & Coke Co., 301 U. S. 495, 514, 57 S. Ct. 868, 875 (1937).

The contributions exacted of the employer by the Louisiana Unemployment Compensation Act are properly referred to as excise taxes.

Chas. C. Steward Machine Co., vs. Davis, 301 U. S. 548, 57 S. Ct. 883 (1937).

Beeland Wholesale Co., vs. Kaufman, Chairman, Alabama Unemployment Compensation Commission, etc., 174 So. 516 (Ala. 1937).

Helvering, Com'r. of Int. Revenue, vs. Davis, 301 U. S. 619, 57 S. Ct. 904 (1937).

However, it is immaterial whether these taxes be referred to as "excise taxes" or by other name.

Carmichael vs. Southern Coal & Coke Co., *supra* (301 U. S., at 509, 57 S. Ct. at 872).

Conceding, for the purposes hereof, that *all* phases of the dredging business carried on by plaintiffs may properly be characterized as maritime and within admiralty, the State of Louisiana may nevertheless exercise—except there be constitutional prohibition against so doing—its inherent and not surrendered sovereign right of imposing excise taxes upon the exercise of the privilege of employing needed workers for the conduct and operation of such business within the borders of the State.

As relating to this, see the following cases, viz:

Gibbons vs. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824);
Chas. C. Steward Machine Co., vs. Davis, *supra* (301 US., at 579, 57 S. Ct., at 880);
Carmichael vs. Southern Coal & Coke Co., *supra* (301 U. S. at 579, 57 S. Ct. at 880);

Reference is also made to:
Lawrence et al vs. State Tax Commission of Mississippi, 286 U. S. 276, 52 S. Ct. 556 (1932).

The constitutional grant of admiralty and maritime jurisdiction to the Federal Government (Art. 3, § 2, and Art. 1, § 8) is in no wise trenched upon, or detracted from, by the attempted levying and collection by a state of an excise tax upon the act of employing an "officer or member of the crew of a vessel on the navigable waters of the United States" when, *as here,* such vessel does not customarily operate from ports within, to ports beyond, the boundaries of such state; the tax is levied upon the "employing" but the resultant state or condition of "employment" remains completely under the dominion of admiralty and maritime jurisdiction. Nor can the fact that Congress, in enacting the Social Security Act, excepted from the term "employment" the service performed by persons as officers and members of a crew of a vessel on the navigable waters of the United States, *of itself,* operate as a prohibition against the State's levy of such an excise tax upon the act of employing such officers and members of crew, inasmuch as the two lawmaking bodies are independent of each other and the State never surrendered to the Federal Government its undoubted right of levying excise taxes.

Nor can such a prohibition be deduced from the further fact that the enactment of the two statutes envisaged a

cooperative endeavor of Nation and State to meet the grave emergency problem of unemployment,—from the fact that the state law was intended to be integrated with the federal statute in order that the two sovereigns might work together to a common end (to use language from Buckstaff Bath House Co. vs. McKinley, 308 U. S. 358, 60 S. Ct. 279); nor can it be reasonably contended that the state legislator was held to a punctilious setting of foot nowhere but in the tracks of Congress in going forward towards the attainment of the jointly-desired result. Surely no fault can be found with the legislator's doing more than Congress, if the purpose of the doing was directed to the same common end.

If it could be held that the taxing of the act of employing (as relates to plaintiff's employees who are engaged in their service as officers and members of crew under the circumstances attending plaintiffs' dredging operations in Louisiana) is prohibited, the prohibition would have to be based upon other ground than the exception of their employment from the meaning of the term "employment", as such term is used in *that* statute.

There must be noted, however, the plaintiffs' further contention to the effect that, inasmuch as their vessels are all enrolled and licensed as vessels of the United States "entitled to the privileges of vessels employed in the coasting trade", the exaction of an excise tax by the State upon the employment of needed officers and members of crew for the navigation of such vessels under authority of said United States license, operates to restrict the free exercise of the license rights derived from the Constitution and laws of the United States; in support of which contention, plaintiffs cite Moran vs. City of New Orleans, 112 U. S. 69, 5 S. Ct. 38 (1884), Harmon vs. City of Chicago, 147 U. S. 396, 13 S. Ct., 306 (1893), and like cases; but a reading of the same makes it quite clear that, in each instance, the local authority in interest had sought

to superimpose an additional license requirement which was to be complied with (under severe penalty), as condition precedent to navigating United States waters in commerce; or, in other words, the privileges conferred by the United States license at issue were not to be enjoyed, except subject to prior compliance with additional conditions laid down by the local taxing authority—a plain prescribing of regulations repugnant to and inconsistent with those of Congress; and, very properly, held invalid.

The excise tax on employment levied by the Louisiana Unemployment Compensation Act, insofar as it relates to the employment by plaintiffs of officers and members of crew engaged in carrying on plaintiffs' dredging work within the State by means of enrolled and licensed vessels, which do not customarily operate "between ports in this State and ports outside this State", does not have the effect, even indirectly, of superimposing additional license requirements, upon the compliance wherewith is conditioned the enjoyment of the United States license right to navigate in the coasting trade, without let or hindrance.

As the Supreme Court, speaking through Chief Justice Hughes, observed in the case of Just et al vs. Chambers (The Friendship II), 312 U. S. 668, 61 S. Ct. 687 (1941), which was before it on certiorari to the United States Circuit Court of Appeals for the Fifth Circuit,

" * * * a state, in the exercise of its police power may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' ".

In view of the premises, the Court's findings of fact and conclusions of law are as follows, viz:

33 FINDINGS OF FACT.

The plaintiffs have failed to establish that the Louisiana Unemployment Compensation Law, i. e. Act. 97 of 1936 (as amended by Act 164 of 1938, Act 16 of the First Special Session of 1940 and Acts 10 and 11 of 1940) does contravene any act of Congress, or does work prejudice to the characteristic features of the martime law, or does interfere with its proper harmony and uniformity in its international and interstate relations.

34 CONCLUSIONS OF LAW.

1. The State of Louisiana, in the exercise of its police power, enjoyed the clear right to establish rules applicable to the act of employing on land and water within its limits (as are to be found embodied in said mentioned Unemployment Compensation Law, supra), even though such rules incidentally affect maritime affairs, provided that there was no such contravention of act of Congress, or the working of prejudice to the characteristic features of the maritime law, or interference with its proper harmony and uniformity in its international and interstate relations.

2. Plaintiffs' prayer that this Court decree unconstitutional, null and void said state statute, and particularly, Section 18 (g) (6) (C) thereof, insofar as it is sought to include within the term "employment" used therein the "services performed by the officers and members of the crews of complainants' vessels while operating on the

navigable waters of the United States within the State of Louisiana," is devoid of sound legal basis and must be denied; and plaintiffs' action, therefore, should be dismissed at their cost.

Let judgment be so entered.

(Signed) A. J. CAILLOUET,
United States District Judge.

New Orleans, Louisiana, March 17th., 1942.

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35 JUDGMENT.

Extract from the Minutes.

February Term, 1942.

New Orleans, Tuesday, March 17th, 1942.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge.

Hon. A. J. Caillouet, Judge.

This cause came on for trial on the merits on December 18th, 1940, and war argued by counsel for the respective parties and submitted, when the Court took time to consider.

Whereupon and upon due consideration thereof, and for the written reasons of the Court on file herein,

It Is Ordered, Adjudged And Decreed that plaintiffs' action be dismissed at their cost.

36 NOTICE OF APPEAL.

Filed Mar. 24, 1942.

(Number & Title Omitted.)

To the Honorable, the Judges of the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

Notice is hereby given that Great Lakes Dredge & Dock Company, Jahncke Service, Inc., McWilliams Dredging Company, Standard Dredging Company (New York), Sternberg Dredging Company, United Dredging Company, Wilbanks & Pierce, Inc., and W. Horace Williams Company, Inc., plaintiffs in the above numbered and entitled action, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the judgment entered in this action on March 17, 1942, dismissing plaintiffs' action.

(Signed) EBERHARD P. DEUTSCH,
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Plaintiffs.

17th Floor Hibernia Bank Bldg.
New Orleans.

MOTION AND ORDER TRANSMITTING EXHIBITS IN THEIR ORIGINAL FORM.

Filed April 11th, 1942.

(Number and Title Omitted.)

On motion of Deutsch, Kerrigan & Stiles, attorneys for plaintiffs in the above numbered and entitled action, and

upon suggesting to the Court that an appeal has been taken from the judgment rendered on March 17, 1942, in this action in the United States District Court of the Eastern District of Louisiana, and that a designation of various portions of the record, including plaintiff's exhibits, A through N inclusive, which are to be contained in the record of appeal has been previously filed;

And upon further suggesting to the Court that it will be necessary to have these exhibits, as aforementioned included in the transcript in their original form for filing in the United States Circuit Court of Appeal.

(Signed) BREARD SNELLINGS,
(Breard Snellings)
of
DEUTSCH, KERRIGAN & STILES.

ORDER.

It is hereby ordered that the Clerk of the United States District Court, in and for the Eastern District of Louisiana include in the transcript in their original form, plaintiff's exhibits designated by the aphabetical inscriptions, A through N inclusive, and that they be filed as such in the United States Circuit Court of Appeal.

(Signed) A. J. CAILLOUET,
Judge.

New Orleans, La., April 11th, 1942.

38 DESIGNATION OF CONTENTS.

Filed March 25, 1942.

In the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division.

File No. 435, Civil Action.

Great Lakes Dredge & Dock Company, et al.,
vs.
Philip J. Charlet, etc.

Plaintiffs and appellants in the above entitled and captioned action hereby designate the following portions of the record to be contained in the record on appeal:

1. Plaintiffs' complaint.

2. Defendant's motion to dismiss.

3. Defendant's answer.

4. Stipulation of facts, with attached exhibits.

5. Joint motion and order transferring case to New Orleans Division.

6. The judgment entered by the District Court.

7. The opinion of the Judge of the District Court.

8. The notice of appeal with date of filing.

(Signed) EBERHARD P. DEUTSCH,
(Eberhard P. Deutsch)
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Plaintiffs.

17th Floor Hibernia Bank Bldg.,
New Orleans.

39 CLERK'S OFFICE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 38 pages contain and form a full, true and complete transcript of the record in the case entitled "Great Lakes Dredge & Dock Company, et al., vs. Philip J. Charlet, etc.," No. 435 of the Civil Action Docket of this Court, as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 13th day of April, A. D. 1942.

A. DALLAM O'BRIEN, JR.,
Clerk.

(Seal)

By H. W. NIEHUES,
(H. W. Niehues)
Deputy Clerk.

[fol. 52] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

JOINT MOTION OF COUNSEL TO SUBSTITUTE C. C. HUFFMAN, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, APPELLEE IN THE PLACE AND STEAD OF PHILIP J. CHARLET—Filed January 19, 1943

UNITED STATES CIRCUIT COURT OF APPEALS

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, et al., Appellants,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, Appellee

Appellants and appellee, through their undersigned attorneys of record herein, move the Court to substitute as appellee C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, in the place and stead of Philip J. Charlet, who no longer occupies said office.

(S.) R. Emmett Kerrigan, Attorney for Appellants.
(S.) W. C. Perrault, Second Assistant Attorney General of the State of Louisiana, Attorney for Appellee.

[fol. 53] ORDER OF SUBSTITUTION

Extract from the Minutes of January 19, 1943

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, et al.,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR

On Consideration of the motion filed by counsel for both parties, to substitute as appellee, C. C. Huffman, Administrator, Division of Employment Security, Louisiana De-

partment of Labor, in the place and stead of Philip J. Charlet, who no longer occupies said office;

It Is Ordered that C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, be substituted as party appellee in this cause in the place and stead of Philip J. Charlet, who no longer occupies said office.

(S.) Saml. H. Sibley, U. S. Circuit Judge.

New Orleans, La., January 19, 1943.

[fol. 54] ARGUMENT AND SUBMISSION

Extract from the minutes of January 25, 1943

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, et al.,

versus

PHILIP J. CHARLET, Administrator, Division of Employment Security, Louisiana Department of Labor, (C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, Substituted in the Place and Stead of Philip J. Charlet)

On this day this cause was called, and, after argument by R. Emmett Kerrigan, Esq., for appellants, and W. C. Perrault, Esq., for appellee, was submitted to the Court.

[fol. 55] OPINION OF THE COURT—Filed February 11, 1943

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, et al., Appellants,

versus

PHILIP J. CHARLET, Administrator, Division of Employment Security, Louisiana Department of Labor, (C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, substituted in the place and stead of Philip J. Charlet), Appellee

Appeal from the District Court of the United States for the Eastern District of Louisiana

(February 11, 1943)

Before Hutcheson, Holmes, and McCord, Circuit Judges

HUTCHESON, Circuit Judge:

Alleging that an actual controversy had arisen and was existing between them and Charlet, as Administrator of [fol. 56] the Louisiana Unemployment Compensation Law,[1] over whether the said law could be lawfully applied to and enforced against them in respect to the employment by them of officers and crewmen in furtherance of their dredging operations on the navigable waters of the United States within the State of Louisiana, plaintiffs brought this suit for a declaration that in respect of the relation of employment between plaintiffs and their employees, they are not subject to the act. As their complaint alleges it, the basis of their claim to a declaration is: that the Louisiana Unemployment Compensation Law was amended in 1938 to bring within its provisions all the vessels and all the employees of plaintiffs, with the result that if valid, plaintiffs were required thereby to pay to the state unemployment fund,

[1] Act 97 of 1936, as amended by Act 164 of 1938; Act 16 of the First Special Session and Acts 10 and 11 of the Regular Session of 1940.

contributions, measured by the wages paid by them to their employees, and in addition, under the Act of 1936, to withhold a portion of the wages due their employees; that in view of the provisions of Art. 1, Sec. 8 and Art. 3, Sec. 2 of the Constitution of the United States, giving to the Congress exclusive power to legislate with respect to matters within the admiralty and maritime jurisdiction of the United States and depriving the states of all power to legislate thereto, the act as so amended is unconstitutional, null and void. The defense was: that the act levied a non-discriminatory excise tax, based upon the exercise of the right or privilege of employing individuals, measured by the wages paid; that the right to levy such tax is inherent in state sovereignty and was not surrendered to the United States; that the statute in no way affects the rights, duties or obligations as between themselves of parties to a maritime contract, and in no way interferes with or contravenes the maritime law or affects the uniformity of that law, or contravenes the purpose or intent of any act of Congress. [fol. 57] Submitted to the court on a stipulation of fact, these defenses were maintained, the claim for declaratory judgment was accordingly denied, and the action was dismissed. The district judge, in a thorough and exhaustive opinion, canvassing the facts and the law,[2] set out both fully and precisely the facts upon which the decision of the case turned, and gathered and adequately discussed the controlling authorities. We agree not only with the conclusion reached, but generally with what is said in the opinion. We shall not, therefore, enter into any detailed statement or discussion of either the facts or the authorities, but, referring to the opinion for that detail, shall content ourselves with a brief summation. In reaching this conclusion, we have assumed, without deciding, though appellee vigorously contests this,[3] that within the exception of Subd.

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[2] Great Lakes Dredge & Dock Co. v. Charlet, 43 Fed. Sup. 981.

[3] Pointing out that the Louisiana statute exempts "services performed as an officer or member of a crew of a vessel on the navigable waters of the United States customarily operating between ports in this state and ports outside this state", Sec. 18g 6(e) of Act 97 of 1936, as amended, he cites administrative rulings under unemployment compensation

3, Sec. 1107, 42 U. S. C. A., all of plaintiffs' employees are officers and members of the crew of a vessel on the navigable waters of the United States. So assuming, we entirely agree with the district judge that plaintiffs are not entitled to the declaration they seek that the Louisiana Unemployment Compensation Act may not, because of the invoked constitutional provisions, be enforced as to them. It is stipulated that the employment relation sought to be taxed involves employees, described in detail, including what are called "shore crews", employed in the customary and usual way in the operation and navigation of dredges, pile drivers and other appurtenances used for deepening, widening, improving, extending and cleaning navigation channels and other navigable waters in Louisiana and for creating fill [fol. 58] and other similar operations, and that such vessels do not customarily operate between ports in Louisiana and ports outside of it.

As regards those activities which are directly connected with commerce and navigation in their interstate and international aspects, it has been held,[4] with respect to workmen's compensation laws, that the law must be uniform throughout the United States, and the laws of the various states are not competent to modify or vary it. The rationale of these cases is that a state law cannot, as between the parties, change or affect rights and obligations arising under a maritime contract or matters having a direct relation thereto. But so narrow and tenuous is the authority of these cases that it is now the well settled rule that, though a contract be maritime, if it is local in character and has no direct relationship to navigation as navigation, state compensation laws may validly apply to persons the contract affects, and this is so because such laws do not interfere with any characteristic feature of general maritime law, do not substantially affect essentially maritime rights and obligations. Thus exception after exception

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statutes of the several states holding that similar workers are not within an exception as broadly worded as that of the federal act. Appellee cites also to the same effect, Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Commission, 126 Pac. (2) 37.

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[4] Southern Pacific vs. Jensen, 244 U. S. 205, and cases following it.

to the board rule the *Jensen* case sought to lay down has been grafted upon it until it has become the mere shadow of its former self. This is well illustrated in the long line of cases culminating in *Just v. Chambers*, 312 U. S. 383, in the statement, "With respect to maritime torts, a state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state act is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation", and the holding, that under Florida law, permitting survival against a wrongdoer's estate of a cause of action against him for tort, a cause of action for a maritime tort committed in Florida waters will survive in ad- [fol. 59] miralty. If, therefore, the statutes in question here could be said to at all affect the contracts as between plaintiffs and employees, that affecting within the authority of these cases, would fall within the exceptions to, rather than within the rule of, the *Jensen* case. But we think it quite plain that the statute is not a regulatory but a taxing act, and that, as such it has no effect whatever upon, but leaves, the contracts, as between plaintiffs and their employees, exactly as they are in respect of every right and obligation which, viewed as maritime contracts, they grant and impose. *Beeland v. Kaufman*, 174 So. 516; *Globe Grain vs. Industrial Com.*, 91 Pac. (2) 512.

As a taxing act, it stands on the firmest kind of ground. It is an excise levied upon that aspect of the employment relation which represents the exercise in a state of the right and privilege of employing persons upon work carried on there, *Stewart Machine Co. v. Davis*, 301 U. S. 548; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495. It is unquestionably valid unless it injuriously trenches upon matters of exclusive federal concern or contravenes some paramount federal legislation. Appellants say that it does both. We think it clear that it does neither. Since the time of *Gibbons vs. Ogden*, 9 Wheaton (1), it has been settled that "the grant of the (federal) power to lay and collect taxes is like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states"; and that "while a state may not use its taxing power to regulate or burden interstate commerce * * *, a state excise tax which affects such commerce, not directly but only incidentally and remotely, may be entirely valid where it is clear

that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights", *Hump* [fol. 60] *Hairpin Mfg. Co. vs. Emerson,* 258 U. S. 295. Thus it is settled that a state may, without offending against the commerce clause, tax instruments used in interstate commerce, *Western Union Tele. Co. v. Mass.,* 125 U. S. 530, as well when they are, as when they are not, maritime, *Old Dominion S. S. Co. vs. Virginia,* 198 U. S. 299. Indeed, exceptional cases aside, it may be stated generally that where such taxes have been invalidated by the courts, the situations are such that a number of states might impose similar taxes, with the result of a pyramiding of tax burdens which could destroy or seriously impair interstate commerce, *Western Live Stock Co. v. Bureau,* 303 U. S. 250, or the statutes have provided an illegal method of measuring or computing the tax as in the case of a tax on the gross receipts from interstate business. *Puget Sound Stevedoring Co. v. Tax Comm.,* 302 U. S. 90; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292; *Given, White and Prince vs. Henneford,* 305 U. S. 434. The tax imposed here is self-limited to Louisiana. Numerous decisions,[5] holding valid state taxes laid upon persons engaged in maritime pursuits and upon maritime instrumentalities attest that it is no impeachment of such a tax that it is laid upon persons engaged in maritime pursuits and upon maritime instrumentalities.

It remains only to consider whether the exception, from the Federal Social Security Act of "officers and crews of vessels" is an expression of the will of congress that such persons so excepted are also to be excepted from provisions of state acts primarily for unemployment compensation. A reading of the act makes it clear that such an intent is not to be found in the express language of the exception and that if it is to be found in the statute at all, it must be by an implica-ion based on the conclusion that the Federal Social [fol. 61] Security act was intended to, and did, set a pattern for state unemployment acts from which they could not vary. We think that the history of the passage of the federal act, what has been written and said about it, and the state acts, *Stewart Machine Co. vs. Davis, supra, Unemployment Compensation Comm. vs. Jefferson Standard Life*

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[5] Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; Old Dominion S. S. Co. vs. Virginia, supra; Huse v. Glover, 119 U. S. 543; Sands vs. Manistee River Impr. Co., 123 U. S. 288.

Ins. Co., 2 S. E. 584, and the structure and contents of the several state acts give rise to an exactly opposite conclusion. That congress could have provided an unemployment compensation system with respect to officers and crews of vessels and have excluded the states wholly from that field may not be doubted. Cf. *O'Donnell, Petitioner, vs. Great Lakes Dredge & Dry Dock Co.*, — U. S. —, Feb. 1, 1943. Whether it could have excluded the states from making provision for unemployment compensation with respect to employees in those occupations without at the same time making affirmative federal provision for them, we need not inquire, for it did not in this case undertake to do that. Neither need we speculate upon the considerations which induced the writing into the federal act of the numerous exceptions it contains. It is sufficient for us to determine whether the presence there of the exception as to officers and crews of vessels operates in any way to impair or restrict the power of the states to lay their unemployment compensation taxes on employments coming within that exception. Appellants, pointing to the fact that as to many of the exceptions congress has by later enactments expressly conferred authority on the states to apply their unemployment compensation laws to classes of employment originally excepted but has not done so as to officers or members of the crews of vessels, insists that this is the strongest kind of proof that the exception was intended to be, and was, exempted not only as to congressional, but to state, taxes as well. We do not think so. The power of a state to tax, as well as its power to govern men and things, will not be lightly stricken down by implication. It may not be doubted [fol. 62] that the state of the authorities is such that there is much confusion to the casual, and no little to the careful, reader of them as to when there is and when there is not such conflict between state and federal regulations of the same subject matter as to exclude a state from a field. This confusion is grounded in and springs in part from the failure of some of the opinions to clearly apprehend and point out the differentiating facts in each situation. It is grounded in part, too, in the failure to draw clearly enough the distinction between those cases where a complainant, subjected to federal regulation of some kind, is attempting to magnify and enlarge the actual scope of the federal law to use it as a shield against, or a cat's paw to draw his chestnuts from the fire as to, state legislation and those

where confronted with positively inconsistent and conflicting state and federal laws and ordered but unable to comply with both, complainant, because of that inability, invokes the paramount protection of the federal laws. Cf. *Cloverleaf Butter Co. v. Patterson*, 116 Fed. (2) 227, 313 U. S. 551. The same considerations but to a far less extent have operated to confuse in the field of taxation. Cf. *Western Live Stock Co. v. Bureau*, 303 U. S. 250. The federal statute invoked here as a limitation upon state power, either in itself or in the history of its enactment, does not, nor do the enactments of the several states, afford apparent basis for a finding that in exempting officers and crews of vessels from the taxing provisions of the federal act, the congress intended to deprive the persons thus excepted from the protection of state unemployment acts, with the result of leaving such employees wholly unprotected by either state or federal law. With the New York Court of Appeals and the [fol. 63] Supreme Court of New Jersey,[6] which have declined to treat this very exception as a prohibition on state action, we are not inclined to invent one. The judgment was right. It is

Affirmed.

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[6] Cassaretakis, Claim of, 44 N. E. (2d) 391; Shore Fisheries vs. Board of Review, 127 N. J. L. 87, 21 Atl. (2) 634. Cf. Capitol Bldg. & Loan Ass'n vs. Kansas Comm., 148 Kans. 466, 83 Pac. (2) 106; Fidelity-Philadelphia Trust Co. v. Hines, 10 Atl. (2) 553; Jefferson Standard Life Ins. Co. vs. North Carolina Unemployment Compensation Comm., 215 N. C. 479, 2 S. E. (2) 584; Ctf. 8 George Washington Law Review, 990.

[fol. 64] JUDGMENT

Extract from the Minutes of February 11, 1943

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,

vs.

PHILIP J. CHARLET, Administrator, Division of Employment Security, Louisiana Department of Labor, (C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, Substituted in the Place and Stead of Philip J. Charlet).

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Great Lakes Dredge & Dock Company, and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 65] UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 10,290

GREAT LAKES DREDGE & DOCK COMPANY, ET AL., Appellants,

versus

PHILIP J. CHARLET, Administrator, Division of Employment Security, Louisiana Department of Labor, Appellee

MOTION AND ORDER STAYING MANDATE—Filed March 5, 1943

Comes now the appellants above named, and respectfully move this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued out of said cause for a period of thirty (30) days from the date

hereof, on the ground and for the reason that appellants expect and intend, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America, by petition for a review, on writ of certiorari, of the decision and judgment rendered in favor of appellee and against appellants in the above entitled cause, and:

Appellants further show to the Court that they are ready, able and willing to make a good and sufficient bond, on conditions as provided by law, in said cause.

Wherefore, appellants pray that the Court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action for a period of thirty (30) days, and that the Court fix the amount of the bond required of appellants, and that they be given reasonable time in which to make, execute and file said bond.

(Signed) James J. Morrison, Attorney for Appellants.

I, James J. Morrison, do hereby certify that a copy of the above motion has been served on appellee by mailing a copy thereof to counsel of record on this, the 5th day of March, 1943.

(Signed) James J. Morrison.

[fol. 66] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 10290

GREAT LAKES DREDGE & DOCK COMPANY, ET AL., Appellants

versus

PHILIP J. CHARLET, Administrator, Division of Employment Security, Louisiana Department of Labor (C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, substituted in the place and stead of Philip J. Charlet), Appellee

On Consideration of the Application of the appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of

the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5th day of March, 1943.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 849

ORDER ALLOWING CERTIORARI—Filed April 5, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following No. 813. Counsel are requested to discuss in their briefs and on the oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 849

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,

Petitioners,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, (C. C. HUFFMAN, Administrator, etc., substituted in the place and stead of Philip J. Charlet).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

R. EMMETT KERRIGAN,
JAMES J. MORRISON,
Attorneys for Petitioners.

DEUTSCH, KERRIGAN & STILES,
RYAN, CONDON & LIVINGSTON,
Of Counsel.

American Printing Co., Ltd., 424 Camp Street

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IN THE

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OCTOBER TERM, 1942

No.

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,

Petitioners,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, (C. C. HUFFMAN, Administrator, etc., substituted in the place and stead of Philip J. Charlet).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, Great Lakes Dredge & Dock Company, Jahncke Service, Inc., McWilliams Dredging Company, Standard Dredging Corporation (New York), Sternberg Dredging Company, United Dredging Company, Wilbanks & Pierce, Inc., and W. Horace Williams Company, Inc., respectfully pray that a writ of certiorari be

issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, dismissing plaintiffs' (petitioners') action.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on February 11, 1943 (R. 55). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

PRELIMINARY STATEMENT

This case challenges the validity of the Louisiana Unemployment Compensation Act[2] under Article 3, Section 2, and Article 1, Section 8, Clause 18, of the United States Constitution. This case and companion cases presently on appeal to this Court from the Court of Appeals for the State of New York[3] are the first tests of the validity of the application of state unemployment compensation legislation to maritime employment to reach this Court.[4] Peti-

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[1]The opinion of the District Court dismissing the action (R. 27) is reported in 43 F. Supp. 981 (1942). The opinion of the Circuit Court of Appeals (R. 55) is not yet reported.

[2]Act 97 of 1936, as amended by Act 164 of 1938, and Acts 10 and 11 of 1940. See Appendix.

[3]Lake Tankers Corporation v. Frieda S. Miller, Industrial Commissioner, October Term, 1942, No. 813; Matton Steamboat Co., Inc., et al. v. Same, No. 783. Also see Standard Dredging Corporation v. Same, No. 722; International Elevating Company v. Same, 723.

[4]While this Court has upheld the constitutionality of state unemployment compensation legislation generally with respect to employment fields within the scope of state police power (Stewart Machine Co. v. Davis, 301 U. S. 548 (1937); Carmichael v. Southern Coal & Coke Co., 301 U. S. 485 (1937)), or within which the Congress has specifically granted the states authority so to affect employment (Buckstaff Bath House Co. v. McKinley, 308 U. S. 358 (1939)), this Court has never ruled on the applicability of such state legislation to a field of employment within the plenary power of Congress wherein the Congress has not authorized state interference.

tioners request that a writ be granted herein and that these cases be consolidated for argument so that the Court may have a full and complete presentation of the substantial constitutional questions involved.[5]

This action is a declaratory judgment proceeding to determine the validity of the Louisiana Act, as amended in 1938, in its application to petitioners' maritime employment. Petitioners are engaged from time to time in the operation and navigation, on the navigable waters of the United States within the State of Louisiana, of dredges and appurtenant vessels documented under the laws of the United States and licensed to engage in the coasting trade.[6] In the course of these operations petitioners must employ officers and crews to operate and navigate their vessels. It is this employment which the State of Louisiana claims the power to regulate and to tax through the provisions of the Act in question.

The Louisiana Act is one of the state administered adjuncts to the Social Security plan.[7] It creates an unemployment compensation fund by the imposition of an excise tax[8] on the privilege of employment in Louisiana. Since 1938 the rate of the employer tax has been 2.7% of the gross payroll.[9] For the period 1936-June, 1940, a tax at the rate of 0.5% was assessed against employees on wages earned, which the employer was responsible for col-

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[5]The other cases, having been decided by a state court, were brought here by appeal as a matter of right. 28 U. S. C. A. 344. The instant case was decided by a federal court and therefore petitioners must rely on certiorari to bring it to this Court. 28 U. S. C. A. 347.

[6]Facts have been either admitted or stipulated (R. 17, *seq.*, 29, 56-57).

[7]42 U. S. C. A. 502, 503. *Cf.* Buckstaff Bath House Co. v. McKinley, 308, U. S. 358 (1939).

[8]Stewart Machine Co. v. Davis, *loc. cit supra* note 4; Carmichael v. Southern Coal & Coke Co., *loc. cit supra* note 4.

[9]Act 164 of 1938, § 6(b). Appendix, p. 20.

lecting and withholding "in trust," and paying in any event.[10] The proceeds of this fund are distributed as benefits to unemployed persons in accordance with provisions of the Act not here relevant.

The act provides in its "Declaration of State Public Policy"[11] that among its purposes is "encouraging employers to provide more stable employment." The regulatory features of the Act, most of which have nothing to do with the enforcement or collection of the tax,[12] but which are designed to regulate employment and to determine eligibility for benefits under the statute, include a comprehensive system of controls, based upon employment reports required to be submitted by the employer,[13] investigation of employment records and practices,[14] provisions for keeping such records in accordance with regulations prescribed by the Commissioner,[15] a grant of broad discretionary and regulatory powers to the Commissioner with respect to "employment stabilization,"[16] provisions for hearings by the Commissioners, and by a Board of Review,[17] with concommitant subpoena power of the books, records, papers and documents of employers,[18] and a grant of power to the Commissioner or the Board to require any reports either "deems necessary for the effective administration of this Act."[19]

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[10] *Id.*, § 6(d).

[11] *Id.*, § 1, Appendix, p. 19.

[12] Indeed, the tax collection and enforcement provisions of the Acts are restricted exclusively to Section 13 thereof. See also La. Act 133 of 1942.

[13] Act 164 of 1938, §§ 10 (a), (g), Appendix, pp. 24, 25.

[14] *Id.*

[15] *Id.*

[16] *Id.*, § 10 (f).

[17] *Id.*, § 10 (g), (h).

[18] *Id.*, § 10 (i).

[19] *Id.*, § 10 (g).

Under the provisions of the 1938 act, petitioners were subjected to even more effective regulation by the operation of a "Merit Rating System" plan.[20] Under this plan, petitioners were "encouraged" to provide more stable employment by a fluctuating tax rate, to become effective July 1, 1941, ranging between 1% and 3.6% of their gross payrolls, assessed against them on the basis of the Commissioner's classification of "employers, industries, and/or occupations with respect to the unemployment hazard in each.[21] . . . He may apply such form of classification or rating system which in his judgment is best calculated to rate most equitably the employment risk for each employer or group of employers and to encourage the stabilization of employment."[22] The regulatory nature of the Act thus seems to be beyond dispute.[23]

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[20]While the present Louisiana unemployment compensation statute (Act 11 of 1940) does not contain a merit system feature, the prior statute, which applies to a portion of the period involved in this litigation, does contain such system, and shows clearly the manner in which the unemployment compensation tax is to continue to operate as an additional sanction for the regulation of employment in Louisiana. Indeed, the present statute contains the following provision: (La. Act 11 of 1940, § 6 (c)): "Study of Experience Rating. The Administrator shall investigate and study the operation of this Act and actual experience hereunder with a view to determining the feasibility of establishing a rating system which would equitably rate the unemployment risk and fix the contribution to the fund of each employer, and which would encourage the stabilization of employment. The Administrator shall submit his report and recommendations to the Governor and the Legislature." This provision clearly shows the State's intention of continuing to use the tax as an essential of the regulatory system, and that it is merely a matter of accumulating sufficient experience to place the regulation into operative effect. In the meantime, the very accumulation of the experience is tantamount to the application of the tax sanction envisioned by the Act, because the rate subsequently to be established by the legislature will reflect the "experience" of each employer or group of employers being complied today. See: Report to Governor, Louisiana Unemployment Compensation Commission, "Experience Rating in Louisiana," April, 1942.

[21]Act 164 of 1938, § 6 (c), Appendix, p. 20.

[22]*Id.*

[23]Compare Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922); Hill v. Wallace, 259 U. S. 44 (1922); United States v. Butler, 297 U. S. 1 (1936).

Prior to 1938, the Louisiana Act, in keeping with the provisions of the Social Security Act,[24] and of similar acts in the other States of the Union, and with the policy expressed both by the President's Committee on Economic Security[25] and by the Social Security Board,[26] exempted from the statutory definition of the term "Employment": "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States."[27] However, in 1938, this definition was amended, contrary to the uniform policy above referred to, so as to exclude from this definition such service only when the vessels are "customarily operating between ports of this State and ports outside this State."[28]

All of petitioners' dredges and appurtenant craft are enrolled and documented under the laws of the United States, and licensed by the United States Department of Commerce, Bureau of Navigation, to engage in the coast-

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[24]42 U. S. C. A., 1107 (c) (3).

[25]Report to the President of the Committee on Economic Security (Govt. Printing Office, 1935).

[26]See Report of the Social Security Board to the President transmitted by him to Congress January 16, 1939, Hearings Relative to the Social Security Act Amendments of 1939 before the Committee on Ways and Means, House of Representatives, 67th Cong. 1st Sess. Vol. 1, p. 12. "Under the Constitution it is impossible to confer upon the states jurisdiction over maritime employment to the extent necessary to meet the needs of unemployment compensation. Therefore, in order to afford such protection to seamen, it would be necessary to pass a Federal act." (See also Document No. 110, p. 16, 76 Cong., 1st Session, House of Representatives. See also Hearings before House Committee on the Merchant Marine and Fisheries, 77th Cong., 1st Sess., on H. R. 5446—Report, Federal Security Agency, p. 198.

[27]Act 97 of 1936, § 18 (g) (7).

[28]Act 164 of 1938, Sec. 18 (g) (6) (C), Appendix, p. 30.

ing trade (R. 17, seq., 21).[29] These vessels are engaged in deepening, widening, improving, extending and clearing navigable channels and other navigable waters, creating fill, and other similar operations. The vessels operate in various states and territories and in foreign countries. When they move on voyages from one scene of operations to another, whether within a state, to another state, or over the high seas to a foreign country, each vessel transports her officers and crew, her machinery, equipment, fuel and supplies. As expressly stipulated, the employees involved "are employed in the navigation and operation" of petitioners' vessels (R. 17).

In the course of their operations, petitioners' vessels have occasion, from time to time, to operate under their federal licenses on the navigable waters of the United States within the State of Louisiana.[30] Frequently their operations in the rivers and coastal waters bounding Louisiana are such that the vessels cross and recross state lines, and often, when operating on such boundaries, it is difficult, if not impossible, to tell with any accuracy in what state the dredges are operating, or are operating most frequently. However, the vessels do not customarily operate between ports within and ports outside Louisiana, and hence, the amended statute directly affects plaintiffs' maritime employment by seeking to regulate and tax it.

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[29]See Original Exhibits "A" to "N", both inclusive, made a part of the record in this application. The Certificate of Enrollment and License is in statutory form (R. S. 4321, 46 U. S. C. A. 163), and provides that "License is hereby granted for the said vessel to be employed in the coasting trade," and "that this license shall not be used for any other vessel, or for any other employment than is herein specified." When engaged in foreign trade, the documentation is changed to registration for that trade. See: In re Benglase Sand & Gravel Co., 76 F2d 593, (CCA 7-1935) 595.

[30]Paragraph 4 of petition (R. 5); admission thereof in answer (R. 14). Paragraph IV and V of Stipulation (R. 18, 19).

The District Court (R. 34) and the Circuit Court of Appeals (R. 57) assumed without deciding that the persons employed aboard petitioners' vessels are officers and members of the crew of vessels on the navigable waters of the United States and within admiralty jurisdiction. It seems quite clear that both courts were correct in making this assumption.[31]

QUESTIONS PRESENTED

The broad question presented is whether the Louisiana Act, as applied to maritime employment aboard petitioners' documented vessels, while operating on the navigable waters of the United States within the State of Louisiana, under their Federal licenses to engage in the coasting trade, is unconstitutional as violative of Section 2 of Article 3 and Clause 18 of Section 8 of Article 1 of the Constitution of the United States. Subsidiary questions may be stated as follows:

1. Whether the Louisiana Act, as applied to petitioners' maritime employment, is invalid as being a tax and a burden on an incident essential to the exercise of petitioners' federal licenses to engage in the coasting trade.[32]

2. Whether the Act, as a comprehensive system of employment regulation, of which the tax feature is a part, when applied to petitioners' maritime employment, violates the uniformity required by the Constitution in things mari-

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[31]Ellis v. United States, 206 U. S. 246 (1907); Kibadeaux v. Standard Dredging Co., 81 F. 2d 670 (CCA 5-1936), cert. den. 299 U. S. 549 (1937); Saylor v. Taylor, 77 Fed. 476 (C. C. A. 4th, 1896); Gayle v. Union Bag & Paper Corp., 116 F. 2d 27, (CCA 5-1940), cert. den. 313 U. S. 559 (1941).

[32]Although this question was presented to the lower court, it was not passed on.

time, and conflicts with federal regulation thereof already preempting the field

3. Whether, in the exercise of its plenary power, Congress expressly or by necessary implication has excluded state unemployment compensation legislation and taxation with regard to maritime employment.

4. Whether the tax is a step in an unauthorized plan, beyond state power, and hence unconstitutional.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

This case presents questions of first importance with respect to the constitutionality of state legislation supplementary to the Social Security Act as applied to maritime employment never heretofore considered by this Court.[33] The issues not only vitally affect the administration of these aspects of the Social Security program, but vitally affect a substantial portion of the maritime industry as well.

As pointed out above,[34] other cases involving certain aspects of the questions raised in this case are presently pending before this Court on appeal, and it is requested that this case be argued with those now pending, so that a full and complete presentation of the matter may be made. A decision of these questions by this Court is of pressing importance, not only to the parties involved, but to the entire maritime industry, and to all of the states in determining whether they may apply their compensation laws to maritime affairs.

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[33] See *supra*, note 4.
[34] See *supra*, note 3.

Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the additional reason that it conflicts with applicable decisions of this Court.

(1)

To the extent that the decision below holds the Act valid as a state excise, privilege or license tax on maritime employment (i.e., on the privilege of employing, or of being employed as, officers and members of the crews of petitioners' federally enrolled and licensed vessels), it is not in accord with the decisions of this Court in the following cases, holding state tax and licensing statutes unconstiutional when applied to maritime activities, or when burdening the exercise of a federal right, privilege or franchise:

Moran v. City of New Orleans, 112 U. S. 69 (1884).
Harmon v. City of Chicago, 147 U. S. 396 (1893).
Washington v. Dawson, 264 U. S. 219 (1924).

Compare:

Helson v. Kentucky, 279 U. S. 245 (1929).
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384 (1935).

Certainly, in licensing petitioners' vessels to engage in the coasting trade, which carries with it the privilege of navigating the inland waters of the United States, the federal government did not contemplate that the vessels would operate in such waters without officers and crews, or that the right properly to man them in the exercise of

such federal licenses should be subject to state taxation. It would seem clear that such licenses include the privilege of employing the necessary officers and crew to man the licensed vessels without state interference or taxation.

(2)

In so far as the Court below held that the Act was not a regulatory measure, it ignored the plain regulatory provisions of Act,[35] its unambiguous "Declaration of State Public Policy",[36] and its clear purpose so as to regulate employment as to reduce unemployment.[37] Indeed, the district court recognized in its conclusions of law (R. 46) that the Act was adopted by the state "in the exercise of its police power", and this conclusion was approved by the Circuit Court of Appeals (R. 57). It seems quite clear that the Act is inconsistent or conflicts in many particulars with treaties and mutilateral conventions ratified or under consideration by the Senate,[38] with federal statutes regulating

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[35]*Cf.* La. Act 164 of 1938, §§ 6, 10, Appendix, pp. 19, 24.

[36]*Id.*, § 1, Appendix, p. 19.

[37]"An unemployment compensation system should be constructed in such a way as to afford every practicable aid and incentive toward the larger purpose of employment stabilization." Message of the President Transmitting the Social Security Bill to Congress, 1935. See also *Unemployment Compensation, What and Why*, Social Security Board (1937), pp. 22, 40-44, 50. State unemployment compensation acts must, of course, conform to the standards established by the Social Security Act in order to obtain approval of the Social Security Board for grants-in-aid. See 42 U. S. C. A. 502, 503.

[38]The Senate has given its advice and approval to the Treaty Covering the Liability of Shipowners in Case of Sickness, Injury or Death of Seamen, containing elaborate provisions for the care and compensation of seamen unemployed for such reasons. (See Convention No. 55, International Labor Conference, 21st Session, Geneva, 1936, reported, 1938 A. M. C., Vol. 2, p. 1297). The Senate is still considering the Draft Convention Concerning Sickness Insurance for Seamen (see Convention No. 56, International Labor Conferece, 21st Session, Geneva, 1936, reported, 1938 A. M. C., Vol. 2, p. 1322), and will no doubt be called upon to consider the Convention Concerning Unemployment Indemnity in Consequence of Shipwreck. (Series No. 8, International Labor Conference, Genoa, 1920, reported, 1938 A. M. C., Vol. 2, p. 1321).

maritime employment,[39] and that it works material prejudice to the characteristic features of the maritime law and interferes with its proper harmony and uniformity in its interstate and international relations.

Thus, the decision below plainly conflicts with the principle announced by this Court in *Kelly v. Washington*[40] that:

> "If . . . the state . . . attempts to impose particular standards as to . . . operation, which . . . pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule."

Gibbons v. Ogden, 9 Wheat. 1 (1824).
The Lottawanna, 21 Wall. 558 (1874).
Hall v. deCuir, 95 U. S. 485 (1878).
Butler v. Boston & S. SS Co., 130 U. S. 527 (1889).
Southern Pac. Co. v. Jensen, 244 U. S. 205 (1917).
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920).
Washington v. Dawson, 264 U. S. 219 (1924).

A clear distinction has been and must be drawn between the extent of the powers of Congress, and of the States, under the Commerce clause of the Constitution on

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[39]See the host of federal laws regulative of maritime employment contained in 46 U. S. C. A. Chapters 11, 18. See also 24 U. S. C. A. 2, 26, 26 (a); 42 U. S. C. A. 6, 409 (b) (A), (B).

As an example, the provisions of the Louisiana Act (§ 6 (d) (1) Appendix, p. 23) requiring the employer to withhold 0.5% of the employees' wages is in direct conflict with the federal statutes providing that seamen's wages shall not "be subject to attachment or arrestment." 46 U. S. C. A. 601. See also 46 U. S. C. A. 594, 596, 597, 599, 603, 604, 642.

[40]302 U. S. 1 (1937) at p. 15.

one hand, and under the Admiralty clause, on the other. With respect to commerce, the constitutional grant to Congress is of a *regulative* power, restricted to its interstate aspect, plenary when exercised, but, except in matters of national concern, shared with the states in the absence of congressional legislation;[41] while the Admiralty Clause grants both to the judiciary,[42] and to Congress,[43] exclusive authority over "all cases of admiralty and maritime jurisdiction." [44] The reception into admiralty of local laws and customs not hostile to the characteristic features of maritime law[45] is entirely consistent with this doctrine of uniformity. As observed by this Court recently in *Just v. Chambers:*[46]

> ". . . the maritime law was not a complete and perfect system and . . . in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration."

Every instance in which local law has been received into the Admiralty, however, has been with respect to the recognition of substantive rights of individuals, such as those with respect to maritime torts,[47] liens,[48] survivorship,[49]

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[41]See New York, N. H. & H. R. v. New York, 165 U. S. 628 (1899).

[42]U. S. Constitution, Art. III, Sec. 2.

[43]U. S. Constition, Art. I, Sec. 8, Clause 18.

[44]See Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920), at p. 161: *"The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."* (Emphasis supplied).

[45]Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); The Lottawanna, 21 Wall. 558 (1874).

[46]312 U. S. 383 (1941) at p. 390.

[47]Western Fuel Co. v. Garcia, *supra* note 45.

[48]The Lottawanna, *supra* note 45.

[49]Just v. Chambers, *supra* note 46; and see Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 (1924).

and the like. Uniformly, where the state has attempted to go beyond, and to impose regulations, either by tax,[50] or otherwise,[51] this Court has held such state action to be unconstitutional,[52] except with respect to historically excluded pilotage[53] and patent unseaworthiness not within the protection of the admiralty jurisdiction.[54]

No question of individual substantive rights of the type received into the maritime law is involved in the instant case. The question here is as to the right of a state to regulate and to tax maritime affairs. The act is a clear invasion of a field reserved exclusively to the Congress under the Constitution. The power to tax is, of course, the power to destroy.[55]

The Court below failed to take into account the distinction pointed out above. The authorities referred to by the Court involving the application of the principles of interstate commerce to corporate franchise taxation afford no basis for a holding under the Admiralty Clause of the

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[50]Moran v. New Orleans, 112 U. S. 69 (1884); Harmon v. Chicago, 147 U. S. 396 (1893); Washington v. Dawson, 264 U. S. 219 (1924).

[51]Gibbons v. Ogden, 9 Wheat. 1 (1824); Hall v. deCuir, 95 U. S. 485 (1878).

[52]*Supra* notes 50 and 51.

[53]Cooley v. Board of Wardens, 12 How. 299 (1851), at p. 315: ". . . it may be observed, that similar laws have existed . . . in the States since the adoption of the federal Constitution; that by the Act of the 7th of August, 1789, 1 Stat. at Large, 54, Congress declared that all pilots . . . shall continue to be regulated in conformity with the existing laws of the States, etc., and that this contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution . . ."

[54]Kelly v. Washington, 302 U. S. 1 (1937) at p. 14: "When the state is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the state to exclude diseased persons, animals, and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce."

[55]M'Culloch v. Maryland, 4 Wheat. 316 (1819).

Constitution. If any of the interstate commerce decisions are authority in the instant case, it is the line of decisions culminating in *Helson v. Kentucky*,[56] and *Cooney v. Mountain States Tel & Tel. Co.*,[57] holding unconstitutional state taxation of instrumentalities, or of indispensable incidents, of interstate commerce, on the ground that state taxation thereof imposes a direct burden on a matter beyond state jurisdiction.

The cases cited by the Court below involving the Admiralty Clause are not in point. *Cornell Steamboat Co. v. Sohmer*,[58] simply upheld a state corporation franchise tax applied against a corporation of its own creation engaged in navigation.[59]

Huse v. Glover,[60] and *Sands v. Manistee River Impr. Co.*,[61] merely approve state authorized charges for the use of state constructed maritime facilities and improvements to navigation—situations not present here. In the *Old Dominion* case[62] the Court, on well-recognized principle, approved a state personal property tax assessed against vessels permanently located within the state. But none of these cases approved the imposition, as is here present, of a state tax on a maritime relationship (i. e., employment of crews) essential to the exercise of a maritime activity duly licensed by Congress.

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[56]279 U. S. 245 (1929).
[57]294 U. S. 384 (1935).
[58]235 U. S. 549 (1915).
[59]There the Court specifically pointed out: ". . . the tax . . . is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity. . . . if the parties . . . are dissatisfied with the price exacted by the state for this privilege, they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the state within the state."
[60]119 U. S. 543 (1886):
[61]123 U. S. 288 (1887).
[62]Old Dominion S. S. Co. v. Virginia, 198 U. S. 299 (1905).

(3)

The lower Court also erred in holding that the Act does not trench upon matters of exclusive federal concern, and that Congress has not expressly, or by necessary implication, exempted maritime employment from state unemployment compensation legislation (R. 57). Briefly, Congress specifically exempted maritime employment from the coverage of the unemployment compensation features of the Social Security Act;[63] and while granting to the states by such Act control over other employment fields in which Congress exercised plenary authority,[64] withheld a grant of authority where maritime employment was concerned.[65] Moreover, both the President's Committee on Economic Security[66] and the Social Security Board[67] recommended that Congress not authorize the states to administer unemployment compensation with respect to maritime affairs, but, to the contrary, that "a separate nationally administered system of unemployment compensation for . . . maritime workers" be established.[68] The House Committee on Ways and Means carefully considered the whole question of extension of state authority to include maritime employment and concluded not to extend the Social Security Act, but to

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[63]42 U. S. C. A. 1107 (c) (3).

[64]*I. e.*, 1. Interstate commerce (except railroads); 2. Instrumentalities of the United States (except those wholly owned or otherwise exempt); 3. National banks; and 4. Persons employed on land or premises owned, held or possessed by the United States. See 42 U. S. C. A. 1106; 45 U. S. C. A. 362 (a); 26 U. S. C. A. 1601; and see Buckstaff Bath House Co. v. McKinley, 308 U. S. 358 (1939).

[65]*Ibid.* There is no similar grant with respect to state control over maritime employment, and indeed the exclusion thereof from the definition of "employment" in the Social Security Act (*supra*, note 63) clearly indicates a congressional intent to withhold such authority from the states.

[66]Report (Govt. Printing Office 1935): "We . . . favor the establishment of a separate *nationally administered* system of unemployment compensation for . . . maritime workers." (Emphasis added).

[67]*Op. cit. supra* note 26.

[68]*Ibid.*, note 66.

refer the matter to the House Committee on the Merchant Marine & Fisheries for consideration and action.[69] A bill is presently pending before the latter committee,[70] establishing a system of unemployment compensation for maritime workers, which differs substantially from that sought to be imposed by Louisiana. This legislative history clearly indicates that Congress meant to exclude unemployment compensation legislation for maritime employment from its cooperative venture with the States.[71]

The Court below relied upon the badly reasoned opinions of two state courts as authority for its decision (R. 62). The *New York* case[72] is presently on appeal to this Court. In both of those cases, as in the instant case, the courts confused the principles of interstate commerce with those of the admiralty. Moreover, the New York court interpreted the provision of the Federal Social Security Act permitting extension of state unemployment compensation legislation to interstate commerce to authorize like extension to admiralty matters,[73] an entirely inadmissible extention of the provision, in no way warranted by a history of the Act, as pointed out above.

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[69]See Hearings on Social Security Act Amendments, 1939, House Committee on Ways and Means (76th Cong., 1st Sess.) pp. 12, 65, 1412 *seq.*, 1423-1424, 1426, 1428, 1450 *seq.*, 2325, 2327, 2471, 2488, 2490 *seq.*

[70]H. R. 9798 (76th Cong., 3rd Sess.) and H. R. 5446 (77th Cong., 1st Sess.). See also Hearings on both bills.

[71]Buckstaff Bath House v. McKinley, 308 U. S. 358 (1939).

[72]Claim of Cassaretakis, 44 N. E. (2d) 391 (N. Y. 1942).

[73]The Court said (44 N. E. (2d) at p. 395): ". . . by section 1606 (a) of the Federal Tax Act, 26 U. S. C. A. Int. Rev. Code, Sec. 1606 (a), the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in Perkins v. Pennsylvania, 314 U. S. 586, 62 S. Ct. 484, 86 L. Ed. ....., affirming 342 Pa. 529, 21 A. 2d 45, the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania Unemployment Insurance Law, 43 P. S. Sec. 751 *et seq.*, to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate."

The New Jersey case involved employment exclusively within the territorial limits of New Jersey, in small surf boats, "more properly within the category of local fishermen and not members of a crew."[74] In the instant case, as stipulated, the vessels frequently, though not customarily between ports, operate outside Louisiana, across the boundaries thereof, and in foreign countries, and employment thereon is indisputably maritime in nature, as expressly assumed by both of the lower courts.

(4)

The court below further erred in not holding the tax imposed by the Act unconstitutional when sought to be applied to petitioners' maritime employment, as a step in an unauthorized plan of state legislation.

Williams v. Standard Oil Co., 278 U. S. 235 (1928).
United States v. Butler, 297 U. S. 1 (1936).
Linder v. United States, 268 U. S. 5 (1925).
Hill v. Wallace, 259 U. S. 44 (1922).

Wherefore it is respectfully submitted that the petition for certiorari should be granted.

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[74]Shore Fishery, Inc. v. Board of Review, 127 N. J. L. 87, 21 Atl. (2d) 634 (1941) at p. 637.

APPENDIX

RELEVANT PROVISIONS

LOUISIANA UNEMPLOYMENT COMPENSATION ACTS

APPENDIX A

Act 164 of 1938

Section 1. Declaration of State Public Policy. As a guide to the interpretation and application of this Act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons.

Section 6. Contributions.

(a) Payment.

(1) On and after January 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment occurring during such calendar year. Such contributions shall become due and be paid by each employer to the Commissioner for the fund in accordance with such regulations as the Commissioner may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

(b) *Rate of Contribution.* Each employer shall pay contribution equal to the following percentages of wages payable by him with respect to employment:

(1) Nine-tenths of one per centum with respect to employment during the calendar year 1936, and such contributions shall be retroactive to January 1, 1936, and shall accrue and become payable from employers with respect to wages for employment occurring on and after January 1, 1936;

(2) One and eight-tenths per centum with respect to employment during the calendar year 1937;

(3) Two and seven-tenths per centum with respect to employment after December 31, 1937, except as otherwise prescribed in subsection (c) of this section.

(c) *Future Rates Based on Benefit Experience.*

(1) The Commissioner shall maintain a separate account for each employer, and shall credit his account with all the contributions paid on

his own behalf. Nothing in this Act shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged, in the amount hereinafter provided, against the accounts of his most recent employers in the inverse chronological order in which the employment of such individual occurred. The maximum amount so charged against the account of any employer shall not exceed one-sixth of the wages payable to such individual by each such employer for employment which occurs on and after the first day of such individual's base period, and shall not be more than $78.00 per completed calendar quarter or portion thereof, which occurs on and after the first day of such individual's base period, but nothing in this section shall be construed to limit benefits payable pursuant to Section 2 of this Act. The Commissioner shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment at the same time.

(3) The Commissioner shall, for the six months' period beginning July 1, 1941, and for each calendar year thereafter, classify employers, industries, and/or occupations with respect to the unemployment hazard in each. Each classification shall be made as of a date, hereinafter referred to as the computation date, which for the six months' period beginning July 1, 1941, shall be January 1, 1941 and for the year 1942 and each calendar year thereafter, shall be July 1 of the preceding year. In making such classifications, the Commissioner shall take ac-

count of the degree of unemployment hazard and of any other measurable factors which he finds bear a reasonable relation to the purposes of this subsection. He may apply such form of classification or rating system which in his judgment is best calculated to rate most equitably the employment risk for each employer or group of employers and to encourage the stabilization of employment. The general basis of classification proposed to be used for any period shall be subject to fair notice, opportunity for hearing, and publication. The rates for any period shall be so fixed that they would, if applied to all employers and their annual payrolls of the period of twelve consecutive months preceding the most recent computation date, have yielded total contributions equaling approximately 2.7 per centum of the total of all such annual pay rolls. The Commissioner shall determine the contribution rate applicable to each employer for the six months' period beginning July 1, 1941, or for any year thereafter, subject to the following limitations:

(i) Each employer's rate shall be 2.7 per centum, unless and until, throughout the three years preceding the most recent computation date, any individual in his employ could have received benefits if eligible.

(ii) No employer's contribution rate shall be less than one per centum, nor more than a maximum of 3.6 per centum.

(4) As used in this section the term "annual pay roll" means the total amount of wages payable by an employer (regardless of the time of payment) for employment during a consecutive twelve-month period.

(d) Contribution by Workers.

(1) Each worker shall contribute to the fund one-half of one per centum of his wages paid by an employer with respect to his employment which occurs after December 31, 1936, and after such employer has satisfied the conditions set forth in Section 18 (f) or Section 7 (c) of this Act with respect to becoming an employer. Each employer shall be liable for the payment of his workers' contributions and shall, notwithstanding any provisions of law in this State to the contrary, withhold in trust the amount of his workers' contributions from their wages at the time such wages are paid, provided he shall show such deduction on his pay roll records, and shall furnish such evidence thereof to his workers as the Commissioner may prescribe. Each employer shall transmit all such contributions, in addition to his own contributions, to the Commissioner in such manner and at such times as the Commissioner may prescribe. If any employer fails to deduct the contributions of any of his workers at the time wages are paid for the next succeeding pay roll period, he alone shall therefore be liable for such contributions, and for the purposes of Section 13 hereof, such contributions shall be treated as employer's contributions required from him. As used in this Act, except when the context clearly requires otherwise, the term "contributions" shall include the contributions of workers pursuant to this section.

(4) Contributions by workers, payable to the Commissioner as herein provided, shall be exempt from garnishment, attachment, execution, or any other remedy for the collection of debts.

Section 10.[1] *Administration.*

(a) *Duties and Powers of Commissioner.* It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this Act, which Commissioner shall prescribe. The Commissioner shall determine his own organization and methods of procedure in accordance with the provisions of this Act and shall have an official seal which shall be judicially noticed.

(b) *Regulations and General and Special Rules.* General and Special rules may be adopted, amended, or rescinded by the Commissioner only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commissioner and shall become effective in the manner and at time prescribed by the Commissioner.

(f) *Employment Stabilization.* The Commissioner with the advice and aid of advisory councils, and

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[1]So far as relevant here, the only change made by Act 10 of 1940, amending this section, was to change the word "Commissioner" to "Administrator".

through the appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining, and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, parishes, drainage and school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers through the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) *Records and Reports.* Each employing unit shall keep true and accurate records, containing such information as the Commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the Commissioner or his authorized representatives at any time and as often as may be necessary. The Commissioner or authorized representative may require from any employing unit any sworn or unsworn reports which he deems necessary for the effective administration of this Act. Any member of the Board of Review, and any appeal tribunal referee may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which he deems necessary for the effective administration of this Act. Information thus obtained, or obtained from any individual pursuant to the administration of this Act, except to the extent necessary for the proper administration of this Act, shall be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the individual's or employing unit's identity, but any

claimant (or his duly authorized representative) at a hearing before an appeal tribunal or the Board of Review shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. Any employee or member of the Board of Review or any employee of the Commissioner who violates any provision of this section shall be fined not less than $20.00 nor more than $200.00, or be imprisoned for not longer than ninety days, or both.

(h) *Oaths and Witnesses.* In the discharge of the duties imposed by this Act, the Commissioner, any appeal tribunal referee, the members of the Board of Review and any duly authorized representative of any of them shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary as evidence in connection with a disputed claim or the administration of this Act. Subpoenas issued pursuant to this subsection may be served by any person duly authorized by the Commissioner for such purpose.

(i) *Subpoenas.* In case of contumacy by, or refusal to obey a subpoena issued to any person, upon application by the Commissioner, the Board of Review ,any appeal tribunal referee, or any duly authorized representative of any of them, any court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commissioner, the Board of Review, an appeal tribunal referee or any duly authorized represen-

tative of any of them, there to produce evidence if so ordered or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in his power so to do, in obedience to a subpoena of the Commissioner, the Board of Review, an appeal tribunal referee, or any duly authorized representative of any of them, shall be punished by a fine of not less than $200.00 or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(j) *Protection Against Self-Incrimination.* No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commissioner, the Board of Review, an appeal tribunal referee, or any duly authorized representative of any of them, or in obedience to the subpoena of any of them in any cause or proceeding before the Commissioner, the Board of Review, or an appeal tribunal referee, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution

and punishment for perjury committed in so testifying.

(k) *State-Federal Corporation.* In the administration of this Act, the Commissioner shall cooperate to the fullest extent consistent with the provisions of this Act, with the Social Security Board, created by the Social Security Act, approved August 14, 1935, as amended; shall make such reports, in such form and containing such information as the Social Security Board may from time to time require, and shall comply with such provisions as the Social Security Board may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the Social Security Board governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this Act.

Upon request therefor the Commissioner shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under this Act.

Section 15. Penalties.

(a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this Act, either for himself or for any other person, shall be punished by a fine of not less than $20 nor more than $50, or by imprisonment for not longer than thirty days, or by both such fine and imprisonment; and each

false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or representative or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under this Act or who refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than $20 nor more than $200, or by imprisonment for not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall knowingly violate any provision of this Act or any order, rule, or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Act, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than $20 nor more than $200, or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this Act while any conditions for the receipt of benefits imposed by this Act were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Commissioner, either be liable to have such sum deducted from any future benefits payable to him under this Act or shall be liable to repay to the Commissioner for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in Section 13 (b) of this Act for the collection of past-due contributions.

Section 18. Definitions: As used in this Act, unless the context clearly requires otherwise—

(g) (1) "Employment", subject to the other provisions of this subsection, means service, including service in interstate commerce, performed for wages or under any contract for services, written or oral, express or implied.

(6) The term "employment" shall not include—

(C) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States customarily operating between ports in this State and ports outside this State;

APPENDIX P

ACT 11 of 1940

Section 6. Contributions.

(a) Payment.

(1) On and after January 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act with respect to wages for employment. Such contributions shall become due and be paid by each employer to the Administrator for the fund in accordance with such regulations as the Administrator may prescribe and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

(b) Rate and Place of Contributions.

(1) Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment;

(i) Nine-tenths of one per centum with respect to employment during the calendar year 1936, and such contributions shall be retroactive to January 1, 1936 and shall accrue and become payable from employers with respect to wages for employment occurring on and after January 1, 1936.

(ii) One and eight-tenths per centum with respect to employment occurring during the calendar year 1937;

(iii) Two and seven-tenths per centum with respect to employment occurring during the calendar years 1938 and 1939 and during the first two calendar quarters of the calendar year 1940.

(2) Each employer shall pay contributions equal to two and seven-tenths per centum of wages paid by him during the last two calendar quarters of 1940, and during each calendar year thereafter, with respect to employment occurring after July 1, 1940.

(c) Study of Experience Rating. The Administrator shall investigate and study the operation of this Act and actual experience hereunder with a view to determining the feasibility of establishing a rating system which would equitably rate the unemployment risk and fix the contributions to the fund of each employer and would encourage the stabilization of employment. The Administrator shall submit his report and recommendations to the Governor and the Legislature.

Section 15. Penalties.

(a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act, either for himself or for any other person shall be punished by a fine of not less than $20 nor more than $50, or by imprisonment for not less than ten days nor longer than thirty days, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or representative or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment or benefits to any individual entitled thereto, or to avoid becoming or remaining

subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under this Act or who refuses to make any such contribution or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records required hereunder, shall be punished by a fine of not less than $20 nor more than $200, or by imprisonment for not less than ten days nor longer than sixty days, or by both fine and imprisonment in the discretion of the judge; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall knowingly violate any provision of this Act or any order, rule, or regulation thereunder, the violation of which is made unlawful of the observance of which is required under the terms of this Act, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than $20 nor more than $200, or by imprisonment, for not less than ten days nor longer than sixty days, or by both such fine and imprisonment in the discretion of the judge, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this Act while any conditions for the receipt of benefits imposed by this Act were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Administrator,

either be liable to have such sum deducted from any future benefits payable to him under this Act or shall be liable to repay to the Administrator for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided, in Section 13 (b) of this Act for the collection of past-due contributions.

IN THE

Supreme Court of the United States

October Term, 1942.

No. 849

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,
Petitioners,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR (C. C. HUFFMAN, ADMINISTRATOR, ETC., SUBSTITUTED IN THE PLACE AND STEAD OF PHILIP J. CHARLET),
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT.

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT.

MAY IT PLEASE THE COURT:

The petitioners seek a declaratory judgment pronouncing unconstitutional the Louisiana Unemployment Compensation Law (Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the Extraordinary Session of 1940, and Act 11 of the Regular Session of 1940) to the extent that it re-

quires them to pay to the State of Louisiana contributions measured by the wages paid by them to their employees while engaged in dredging operations on the navigable waters of the United States within the State of Louisiana The sole basis of attack is that the State of Louisiana in enacting said statute invaded a field of legislation reserved exclusively to the United States by Article I, Section 8, and Article III, Section 2, of the Constitution of the United States.

The respondent, who is the Administrator of the Division of Employment Security of the Department of Labor of the State of Louisiana, the official charged with the enforcement of the statute, contends that the Louisiana statute levies a nondiscriminatory excise tax based upon the exercise of the right or privilege of employing individuals measured by the wages paid, the right to levy which existed prior to the adoption of the Constitution and which was reserved to the states by the Constitution; that the statute under attack in no way affects the rights, duties or obligations of the parties *inter se* to a maritime contract and in no way interferes with or contravenes the maritime law or affects the uniformity of that law or contravenes the purpose and intent of any Act of Congress.

These defenses were maintained by the District Court (*Great Lakes Dredge & Dock Co. v. Charlet*, 43 F. Supp. 981) in dismissing petitioners' suit. The Circuit Court of Appeals for the Fifth Circuit (Id. R. 54) affirmed the decision of the District Court. Similar defenses prevailed in six cases decided by the Court of Appeals of the

State of New York. *Claim of Casseratakis, et al.*, 44 N. E. 2d 391.

I.

JURISDICTION.

In granting certiorari, the Court requested counsel "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute."

The Federal Declaratory Judgment Act (28 U. S. C. A., Sec. 400) was originally enacted in 1934 and contained no provision denying jurisdiction to federal courts to entertain suits involving taxing statutes. In 1935, the Act was amended so as to provide that the act could not be invoked with respect to federal taxes. In 1937, the Congress passed the Johnson Act (28 U. S. C. A., Sec. 41(1)) which provides:

> "No district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Section 18 of Article 10 of the Constitution of Louisiana of 1921, the present Constitution, provides:

> "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for

> a complete and adequate remedy for the prompt recovery by any taxpayer of any illegal tax paid by him."

Under authority of that provision of the State Constitution, the Legislature of Louisiana enacted Act 330 of 1938, amending and re-enacting Act 16 (2nd. E. S.) of 1934, as amended by Act 23 (2nd. E. S.) of 1935, printed in full as an appendix to this brief, which denies jurisdiction to any state court to restrain the collection of any tax imposed by the State and provides a remedy for any taxpayer who has paid any tax, the whole or any part of which has been declared illegal by any court of competent jurisdiction, to secure reimbursement. The statute provides that the taxpayer shall pay the tax under protest and give the tax collector notice of his intention to sue for the recovery of the tax, whereupon the tax collector shall segregate the amount and hold it for a period of thirty days. If the taxpayer files his suit within the thirty day period, the tax collector must hold the amount until the suit is finally decided. The sole defendant in the suit is the tax collector, and the action may be brought in either state or federal courts.

The remedy afforded by this statute appears to meet fully the condition prescribed by the Johnson Act, and it remains to determine if Sec. 41(1) of the Johnson Act should be read into the Declaratory Judgment Act. Judge Clancy of the District Court for the Southern District of New York, in the case of *Collier Advertising Service, Inc. v. City of New York*, 32 F. Supp. 870, says that it should because (p. 872):

> "It would be disingenuous to deny that a declaration of the plaintiff's claimed rights in this action

> would secure any other result than to enjoin, suspend and restrain the operation of the Sales Tax Law upon its business. Any other holding would substantially nullify the Johnson Act."

On the other hand, Judge Kennedy of the District Court of Wyoming, in the case of *Morrison-Knudsen Co., Inc. v. State Board of Equalization of Wyoming*, 35 F. Supp. 553, expressed a contrary view, holding that the Declaratory Judgment Act provided an exception only in cases involving federal taxes and that the Johnson Act applies only to suits where injunctive relief is sought. He asserts that his view is supported not only by the history of the legislation but also by the fundamental rule of construction that unambiguous statutes should be construed as they read.

The Johnson Act is discussed in the case of *City of El Paso* (5 C. C. A.), 100 F. (2d) 501, 502-503, where it is said that this act emphasizes "the increasing disinclination of federal authority to interfere in State matters until State remedies have been exhausted" and that:

> "This disinclination is founded in comity, rather than on a want of power either as a federal court or as a court of equity. It looks to a maintenance of the smooth and satisfactory operation of our dual form of government. Compare Pennsylvania v. Williams, 294 U. S. 176, 177, 55 S. Ct. 380, 79 L. Ed. 841, 96 A. L. R. 1166."

The petitioners in this case have not invoked the remedies provided by the state remedial statute above referred to, nor have they attacked the Louisiana Unemployment Compensation Law, constitutionally or otherwise, in the courts of Louisiana.

Tax matters as proper subjects of actions for declaratory judgments under declaratory judgment statutes of the several states, as well as under the Federal Declaratory Judgment Act, are discussed copiously in the Annotation in 132 A. L. R., beginning at page 1108. Federal cases on the subject are cited on pages 1111, 1113, 1114, 1115, 1120 and 1122, but only the two District Court cases above quoted from appear to deal directly with the question whether or not the Johnson Act should be read into the Federal Declaratory Judgment Act.

Attention is also called to Section 13(g) of the Louisiana Unemployment Compensation Law, which appears to provide an additional remedy for the recovery of contributions erroneously paid by employers. The Clerk has been furnished with printed copies of that statute for the convenience of the Court.

II.

THE WORKMEN'S COMPENSATION ACTS ARE IRRELEVANT TO THE ISSUE.

The petitioners rely upon the decisions holding workmen's compensation acts unconstitutional insofar as they pretend to apply to maritime contracts, but these decisions are inapplicable here for the reason that they, unlike the unemployment compensation statutes, change the legal rights and obligations of the parties to a maritime contract of employment. They alter, and in some cases actually set aside, the common law rules governing the rights and

duties of employer and employee in accident cases and fix a definite amount of compensation which the employer must pay to the employee in case of disability and to his dependents in case of death in lieu of the common law liability limited and confined to cases of negligence. They permit an employee to recover in spite of his negligence, but he recovers less than he can in a common law action, and they relieve the employee of proving negligence and the amount of damages, giving him a certain and speedy remedy to obtain a fixed and moderate compensation for his injuries. In short, they set aside one system of rules and substitute another system in its place. *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 Sp. Ct. 247. A typical case is that of *Washington v. Dawson,* 264 U. S. 219, 44 Sp. Ct. 302, cited and stressed by the appellants in their brief. There the Workmen's Compensation Act of the State of Washington was before the Court and contained the following provisions:

> "Section 7673. Declaration of police power. The common law system governing *the remedy of workmen against employers* for injuries received in hazardous work is inconsistent with modern industrial conditions * * * the State of Washington, therefore, exercising herein its police and sovereign power, declares that all *phases of the premises are withdrawn from private controversy * * * and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.*" (Emphasis ours.)

> "Section 7679. Schedule of awards. Each workman who shall be injured in the course of his em-

ployment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, *such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever* * * *." (Emphasis ours.)

The Court held that the act was unconstitutional under the rule laid down in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sp. Ct. 524, because the statute, as in the case of other workmen's compensation laws, sought to fix the rights and liabilities of the parties in cases of maritime injuries, and, therefore, involved matters within the admiralty jurisdiction. The decision rested entirely upon the fact that the Washington statute withdrew a right of action from the admiralty jurisdiction.

In the matter of *Doey v. Howland Co.*, 224 N. Y. 36, 120 N. E. 53, the court said:

"An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Am. Cas. 1916 B 158. The contract of employment, by virtue of the statute, contains an implied provision, that *the employer, if the employee be injured, will pay to him* a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services

rendered in the course of the employment." (Emphasis ours.)

Having shown that the workmen's compensation statutes materially altered the rights and obligation of *the parties themselves* to a maritime contract, which the Supreme Court held the states had no power to do, let us examine the Louisiana Unemployment Compensation Law and compare its pertinent provisions with those of the workmen's compensation statutes in the light of what has been said above.

This statute establishes an unemployment insurance fund in the nature of a single reserve out of which benefits are paid for a limited period of time to those who by reason of economic maladjustment or other causes are temporarily unemployed. The fund is created by contributions paid by employers subject to the Act (Section 18(f))* and fixed at 2.7% of the wages paid to employees (Section 6(b)). Certain employers are exempt from its operation (Section 18(g) (6)). Benefits are paid out of the fund to unemployed persons who register as such with the State Employment Office and who are ready, able and willing to work but who are unable to find suitable employment and have, during a base period, been paid wages for insured work equal to not less than twenty times the weekly benefit amount (Section 3). The weekly benefit amount is 50% of the full time weekly wage, but cannot exceed $18.00 per week and cannot be less than $3.00 per week (Section 2(b) (1)). Free employment offices are provided in such number as the Administrator finds necessary (Section 11). Before unemployment compensation benefits commence, the

* Section references to Act 97 of 1936, as amended.

statute provides for a waiting period of two weeks, and an employee who lost his job through misconduct can be made to wait for an additional six weeks (Section 4(b)). Contributions collected under the act are pooled in the Unemployment Compensation Fund (Section 8 (a)), and monies in the fund are deposited in the Unemployment Trust Fund of the United States so long as that fund exists (Section 8(b)). As the money is needed for benefit payments the Administrator is authorized to make requisition for such amounts as may be necessary (Section 8(c)).

It should be noted that, unlike workmen's compensation statutes, the Louisiana Unemployment Compensation Law is not in lieu of any preexisting statutory or common law rights or obligations and neither enlarges nor limits *inter se* the rights of the parties to any contract of employment, which remains entirely unaffected. That view was adopted by the Circuit Court of Montgomery County, Alabama, in the case of *Beeland Wholesale Company v. Kaufman*, (Vol. 1, Commerce Clearing House Unemployment Insurance Service, Alabama, Sec. 8023, p. 5516, affirmed 234 Ala. 249, 174 So. 516), in which the constitutionality of the Alabama Unemployment Compensation Law was at issue. There the Court said:

> "The obligation of a contract is that duty of performing the contract according to its terms and intent, which the law recognizes and enforces. *The law here under consideration does not provide for any deviation from the terms of the contract* by increasing its burdens or decreasing its efficiency, or by hastening or postponing the time of its performance. *Neither party is absolved from performing the contract. The remedy for the enforcement of*

> *the contract is not cut off.* The Court is of the opinion that the Act leaves the parties at liberty to make any terms they see fit, *and in no way affects the obligations of the contract.*" (Emphasis ours.)

In 4 *Fordham Law Review,* page 496, it is said:

> "The unemployment acts make no similar substitution (substitution for the rights or duties of an employer) since they confer no benefit on the employer and remove no existing liability."

Attention is also called to the case of *Globe Grain & Milling Co. v. Industrial Commission of Utah and Albert E. Thomas,* 91 P. 2d 512, (amended on rehearing, 97 P. 2d 582), in which the Supreme Court of Utah held that the contract of employment involved in that suit was not impaired by the Utah Unemployment Compensation Act within the meaning of Article I, Sec. 18, of the State Constitution and Article I, Section 10, of the Federal Constitution. The Court said at page 516:

> "* * * no question of the impairment of contract is involved. The contract is not impaired; it goes on as before. The relationship created by the contract is taxed * * *."

It appears to be crystal clear that the Louisiana Unemployment Compensation Law in no way changes or affects any legal rights or obligations *between the employer and the employee.* It simply imposes on employers an excise tax made payable to the State. No remedy is given by it to the employee against the employer or in favor of the employer and against the employee. The sole right conferred is one in favor of the employee *against the State;*

and his right comes into existence only *when he becomes unemployed and when the relation of employer and employee has ceased to exist.* The act does not operate upon the contract of employment, but recognizes the relation of employer and employee only to the extent of determining whether an employer must pay a tax for its privilege of having persons in his employ within the territorial limits of the State of Louisiana and for the additional purpose of determining whether a claimant is entitled to unemployment benefits, because he earned wages under such a contract.

III.

THE TAX IMPOSED BY THE LOUISIANA UNEMPLOYMENT COMPENSATION LAW IS AN EXCISE.

That the contributions required by the Louisiana Unemployment Compensation Act are excises levied upon the exercise of the right and privilege of employing persons can scarcely be denied, and any doubt which may have previously existed in that respect has been dispelled by the decisions of the Supreme Court in the cases of *Steward Machine Co. v. Davis,* 301 U. S. 548, 578-583, 57 Sp. Ct. 883, and *Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495, 508, 509, 57 Sp. Ct. 868, the first involving a "payroll" tax levied by Section 901 of the Social Security Act, Public No. 271, 74th Congress, now Section 1600 of the Internal Revenue Code, and the latter dealing with a similar tax imposed by the Unemployment Compensation Act of the State of Alabama, Act 447 of 1935; Alabama Code of 1928 (1936 Cum. Supp.), Section 4. See also *Beeland Wholesale*

Co. v. Kaufman, 174 So. 516, 234 Ala. 249. The provisions of the Alabama Act are basically the same as those of the Louisiana Statute and, if the one levies an excise tax, the other likewise does so. In the later case of *Helvering v. Davis*, 301 U. S. 619, 57 Sp. Ct. 904, involving the validity of Section 804 of the Social Security Act, now Section 1410 of the Internal Revenue Code, which levied a tax on employers measured by the wages they paid to their employees, the Supreme Court said:

> "The tax upon employers is a valid excise or duty upon the relation of employment." (p. 645.)

It is needless to say that a statute need not designate an excise as such and that its character as an excise is not affected even if the statute gives it another name. *Barwise v. Sheppard*, 299 U. S. 33, 36, 57 Sp. Ct. 70; *Carmichael v. Southern Coal & Coke Co., supra*, p. 508; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387, 51 Sp. Ct. 170.

IV.

THE RIGHT OF A STATE TO IMPOSE EXCISE TAXES INHERES IN THE STATE, AND IS A POWER RESERVED TO THE STATES BY THE FEDERAL CONSTITUTION.

The State of Louisiana's power to impose an excise on employment originated before the adoption of the Federal Constitution and was reserved to it by that instrument as an attribute of State sovereignty. Having shown that the validity of payroll taxes has been recognized by the

highest court of the land, the historical background of such excises, as related by Mr. Justice Cardozo in *Steward Machine Co. v. Davis*, 301 U. S. 548, 579-580, 57 Sp. Ct. 883, is interesting and important. There the learned jurist said:

> "As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. *Cf. Pensacola Telephone Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9; *in re Debs*, 158 U. S. 564, 591; *South Carolina v. United States*, 199 U. S. 437, 448, 449. But in truth other excises *were* known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted 'to His Majesty certain Rates and Duties upon Marriage, Births and Burials,' all for the purpose of 'carrying on the War against France with Vigour.' See *Opinion of the Justices*, 196 Mass. 602, 609. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual 'duty' of 21 shillings for 'every male Servant' employed in stated forms of work. Revenue Act of 1777, 17 George III, c. 39. The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis v. Boston & Main R. R. Co. supra.* It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be

thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for 'every white servant whatsoever, except apprentices under the age of twenty-one years.' 10 Hening's Statutes of Virginia, P. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seems to be willing to concede." (Emphasis ours.)

And in *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 508, 57 Sp. Ct. 868, Mr. Justice Stone said:

"Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied upon property or its use, but they may likewise be laid on the exercise of personal rights and privileges. As has been pointed out in the opinion in the Chas. C. Stewart Machine Co. case, such levies, including taxes on the exercise of the right to employ or to be employed *were known to England and the Colonies before the adoption of the constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution and which was reserved to them by that instrument.*" (Emphasis ours.)

How could language be used more suggestive that there may be no inhibitions upon the power of the several States to levy excise taxes upon the right to employ? Of course, the taxing power of a State must be exercised within the limitations imposed by the Fourteenth Amendment to the United States Constitution but, except as limited by that

amendment, the power of a State to tax those within its boundaries appears to be unrestricted. On that subject Mr. Justice Stone said in *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280, 52 Sp. Ct. 556:

> "The Federal Constitution imposes on the States no particular modes of taxation and apart from the specific grant to the Federal Government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the State unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the State or *on privileges enjoyed there*, and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment." (Emphasis ours.)

And what is there said applies in spite of the fact that the petitioners in the case at bar are engaged in a business which in some respects is subject exclusively to regulation by Congress, as indicated in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, in which Chief Justice Marshall, speaking for the Court, said:

> "The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and *has never been understood to interfere with the exercise of the same power by the states;* and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms of their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The

power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. *This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do.* Congress is not empowered to tax for those purposes which are within the exclusive province of the states. *When, then, each government exercises the power of taxation, neither is exercising the power of the other.* But, when a state proceeds to regulate with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. *There is no analogy, then, between the power of taxation and the power of regulating commerce* * * *." (pp. 199, 200.)

"In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive

and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. *But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce.* (pp. 201, 202.)

"The right to regulate commerce, even by the imposition of duties was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

"These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purpose to restrain." (pp. 202, 203.) (Emphasis ours.)

It must be conceded by petitioners that the power of Congress to regulate and control maritime matters is not an express constitutional grant of power but one implied from the general grant by Article III, Section 2, of the United States Constitution to the federal judiciary of jurisdiction in admiralty and maritime cases. That being true, it follows that the constitutional inhibition there implied cannot be extended any further in maritime matters than can the inhibition on the power of the states provided

expressly by the commerce clause of the Federal Constitution in matters of interstate commerce. It cannot be denied that a State may, without offending the commerce clause of the Constitution, impose excises upon corporations engaged in interstate commerce provided, of course, the tax is not discriminatory, and is not so burdensome as to constitute a direct and unreasonable interference with such commerce. The Court said that in the case of *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294, 42 Sp. Ct. 305:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases) on the other hand, it is settled that a state excise tax, which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

The petitioners do not pretend that the excise levied by the Louisiana statute under attack is discriminatory or that it interferes unreasonably or onerously with their interstate or maritime business, but they contend solely that the statute prevents the uniform operation of the maritime law, about which more will be said later in this brief. It is undeniable that a state may tax the instruments used in interstate commerce without offending the commerce clause of the Constitution *(Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sp. Ct. 961), even where the nature of the commerce is maritime *(Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 305, 25 Sp. Ct. 686), and the cases where such taxes have been invalidated by the courts are limited to situations where a

number of states would have an equal right and opportunity to impose similar taxes with the result that there would be a pyramiding of tax burdens which would destroy or *seriously* impair such commerce *(Western Live Stock Co. v. Bureau,* 303 U. S. 250, 255, 256, 58 Sp. Ct. 546), or to cases where the statute provided an illegal method of measuring or computing its tax, as in the case of a tax on the gross receipts from interstate business. *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U. S. 90, 93, 94, 58 Sp. Ct. 72; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 38 Sp. Ct. 126; *Givin, White & Prince v. Henneford,* 59 Sp. Ct. 325, 305 U. S. 434.

It is likewise undeniable that Congress has the power to tax a privilege created by State law such as the transfer of property by last will or inheritance *(Knowlton v. Moore,* 178 U. S. 41, 58, 20 Sp. Ct. 747), or the enjoyment of a corporate franchise *(Flint v. Stone Tracy Co.,* 220 U. S. 107, 155, 31 Sp. Ct. 342). That being true, there should be no reason why the state should not have the power to tax the same privilege, and Mr. Justice Cardozo indicated as much in the case of *Steward Machine Co. vs. Davis,* 301 U. S. 548, 581, 57 Sp. Ct. 883, when he said, with reference to the power of the Congress to levy excise taxes on the right to employ, that the choice of the subject matter of taxation by Congress "is as comprehensive as that open to the power of the States".

Although the right to employ may be exercised by the Federal Government, this right is one which primarly is granted by the States and reserved to them in the United States Constitution. *(Steward Machine Co. v. Davis,* 301

U. S. 548, 578-583, 57 Sp. Ct. 883; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 508, 57 Sp. Ct. 868), and even if we should agree with the contention of the petitioners that legislative power over maritime contracts rests exclusively and entirely with Congress, we think that would not preclude a state having the power to create a privilege from taxing its exercise because we think, as was said in *Gibbons v. Ogden*, 9 Wheat. 1, and *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280, 52 Sp. Ct. 556, in levying such taxes the state has co-equal power with the federal government. It may be well, however, to mention here the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sp. Ct. 524, so confidentially relied upon by the plaintiffs, which expressly says that to some extent, at least, the state may legislate with respect to maritime matters and to limited degree even change the general maritime law. In that case, Mr. Justice McReynolds says at page 216:

> "* * * it would be difficult, if not impossible to define with exactness just how far the maritime law may be changed, modified or affected by state legislation. *That this may be done to some extent cannot be denied.*" (Emphasis ours.)

The petitioners in this case are engaged admittedly in the business of increasing the navigability of streams and other navigable waters through dredging operations. An analagous business was carried on in the case of *Trinity Farm Construction Co. v. Grosjean*, 291 U. S. 466, 470-472, 54 Sp. Ct. 469. There the construction company had a contract with the federal government to construct levees in aid of navigation on the Mississippi River, and it was held

that the State of Louisiana could validly tax gasoline used in the construction of the levees.

In *Susquehanna Co. v. Tax Commission* No. 1, 283 U. S. 291, 51 Sp. Ct. 434, the validity of a state tax on submerged lands was at issue. These lands were submerged as the result of the building of a dam by the appellant under license by the Federal Power Commission to construct this dam across the navigable waters of the Susquehanna River, and the appellant claimed immunity from state taxes on the ground that it was performing a federal function. The tax was sustained and, in doing so, the court explained:

> "The exemption of an instrumentality of one Government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other." (p. 294.)
>
> "With that end in view, the distinction has long been taken between a privilege and a franchise granted by the Government to a private corporation in order to effect some government purpose, and the property employed by the grantee in the exercise of the privilege but for private business advantage." (p. 294.)

The plaintiff in the case of *Cornell Steamboat Co. v. Sohmer,* 235 U. S. 549, 35 Sp. Ct. 162, was engaged in the business of towing on the navigable waters of the United States under a license granted by the United States. The State of New York sought to impose a franchise tax upon the steamboat company which was resisted on the ground that the state had no power and jurisdiction to levy the

tax and that "it is in reality and substance an attempt to enforce a license tax for the privilege of navigating the public waters of the United States, a privilege already granted under the general government". (p. 558.) The Court dismissed that contention in the following language:

> "While the state may not require a navigation license except in very exceptional cases, as for compensation for improvements which the state has made, a situation not presented here, it may certainly as to a corporation of its own creation having property within its borders, enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers." (pp. 559-560.)

The case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 Sp. Ct. 868, is authority, inferentially at least, for the right of a state to impose unemployment insurance taxes upon maritime employers. There the Court said:

> "It is arbitrary, appellees contend, to exempt those who employ agricultural laborers, domestic servants, *seamen*, insurance agents, or close relatives, or to exclude charitable institutions, interstate railways, or the government of the United States or of any state or political subdivision. A sufficient answer is an appeal to the principle of taxation already stated, that the state is free to select a particular class as a subject for taxation. The character of the exemptions suggests simply that the state has chosen, as the subject of its tax, those who employ labor in the processes of industrial production and distribution." (p. 512.) (Emphasis ours.)

A tax on the right to employ measured by wages paid under a maritime contract is not laid upon the federal government, its property or officers, *Dobbins v. Commissioners,* 16 Pet. 435, 449, 450; or upon an instrumentality of the federal government, *McCulloch v. Maryland,* 4 Wheat. 316; *Osborn v. Bank of U. S.,* 9 Wheat. 738; *Gillespie v. Oklahoma,* 257 U. S. 501; *Federal Land Bank v. Crosland,* 261 U. S. 374; *New York ex rel. Rogers v. Graves,* 299 U. S. 401; or upon a contract with the federal government, *Western Union Telegram Co. v. Texas,* 105 U. S. 460, 464, 466; *Weston v. Charleston,* 2 Pet. 449, 468, 475; *William v. Tallodega,* 226 U. S. 404, 418, 419; *Panhandle Oil Co. v. Mississippi ex rel, Knox,* 277 U. S. 218, 222. We have been unable to find any authority in support of the view that any private corporation is entitled to any constitutional immunity from the payment of a state tax simply because it is operating in a field which the federal government has the power to regulate. That the contrary is true is shown by the case of *Alward v. Johnson,* 282 U. S. 509, 514, 51 Sp. Ct. 273, in which a state tax on automobiles used in the operation of a stage line, based upon their use of state highways and measured by gross receipts, was held applicable to one who held a mail carrier's contract with the government; by the case of *Ayer & Lord Co. v. Kentucky,* 202 U. S. 409, 420, 421, 26 Sp. Ct. 679, where it was held that a vessel plying between ports in different states may be taxed by the state of its domicile, the Court there following the rule "that the service in which these vessels are engaged formed one link in a line of interstate commerce may affect the state's power of regulation but not its power of taxation" *(Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299,

306). See also *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Transportation Co. v. Wheeling*, 99 U. S. 273.

There are numerous examples of validly laid state taxes upon persons engaged in maritime pursuits and upon maritime instrumentalities, such as franchise taxes *(Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549); taxes on maritime insurance corporations (measured by premiums received on maritime insurance policies (Sec. 169 a, N. Y. Insurance Law), which the courts have held to be maritime contracts *(Aetna Insurance Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121, certiorari denied, 284 U. S. 628) and governed by the general maritime law; taxes on shipping *(Transportation Co. v. Wheeling, supra)*; tolls upon ships using state improved waterways but engaged in interstate and foreign commerce *(Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288).

If such taxes are valid, we fail to understand why the Louisiana Unemployment Compensation tax should be any less so, particularly in view of the fact that the act *imposes no tax upon maritime contracts or upon the wages paid under such contracts*, but simply imposes an excise tax upon the exercise of the privilege of employing persons measured by the wages paid to them.

At this point it may be well to remark that the petitioners' confidence in their view that Article III, Sec. 2, of the Federal Constitution confers upon Congress *exclusive* general jurisdiction of maritime contracts of employment

is not justified. Chief Justice Marshall apparently did not share that view in the case of *United States v. Bevans*, 3 Wheat. 366, 388, 389. There the Chief Justice, speaking for the Court said:

> "It is observable that *the power of exclusive legislation (which is jurisdiction)* is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, *in describing the* [illegible] *had*

> "It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, *the general jurisdiction over the place*, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. *The residuary powers of legislation are still in Massachusetts.* Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have devested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative—and we believe they must—then the bay in which this murder was committed is not out of

> jurisdiction of a state, and the Circuit Court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which has been committed." (pp. 288, 389.) (Emphasis ours.)

The language of the Court simply means the article of the Constitution does no more than to confer upon federal courts admiralty jurisdiction of maritime cases, and that its purpose is not to deprive state courts of the jurisdiction they had before the constitution was adopted; nor was it [illegible] purpose of the article to confer upon Congress the [illegible] power to determine the content of maritime law. [illegible] this point we again refer the Court to the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 216, in which it is said:

> * * * it would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.* (Emphasis ours.)

The petitioners argue that they carry on their operations under a maritime license granted by the federal government and that the Louisiana Unemployment Compensation Law affects the rights granted under that license. That argument was disposed of by the District Judge (R. 44-45, 43 F. Supp. 989), who said nothing in the statute remotely affects this maritime license and that the cases relied on by the complainants involved an effort to superimpose additional license requirements which, under severe penalty, had to be complied with as a condition

precedent to navigating United States waters in commerce. It is difficult to understand how the imposition of a tax on maritime employers in any way affects the exercise of their maritime license rights. If the argument is an attempt to establish that the federal and state governments have no concurrent rights insofar as the exercise of the taxing power is concerned with respect to matters in which the federal government may have a legitimate interest, the petitioners' position is completely in conflict with the trend of opinion of the Supreme Court of the United States. *McGoldrick v. Berwind-White Coal Mining Co.*, 60 Sp. Ct. 388 (Jan. 29, 1940).

The petitioners' objection to the asserted regulatory provisions of the Louisiana statute and its asserted interference with maritime employment and the resulting effect on their license rights will be discussed in the succeeding topic.

V.

THE STATUTE UNDER ATTACK DOES NOT IMPAIR THE GENERAL MARITIME LAW OR ANY ACT OF CONGRESS, OR INTERFERE WITH THE HARMONIOUS AND UNIFORM OPERATION OF THE MARITIME LAW.

Having shown that the workmen's compensation acts are totally irrelevant to the issue presented in this case and that, in enacting the Unemployment Compensation Law, the State of Louisiana exercised its concurrent power

to impose a non-discriminatory excise tax as an attribute of sovereignty antedating the Federal Constitution, which that instrument reserves to it, we now intend to meet the plaintiffs' argument that the statute interferes with the harmonious and uniform operation of the general maritime law.

Bouvier says (Vol. 2, p. 2092, 3rd Rev.) that maritime law is "that system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the maritime conveyance of persons and property". In *The Blackheath Case*, 195 U. S. 361, 25 Sp. Ct. 46, Mr. Justice Holmes explains that "the precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history", indicating in plain words how indefinite is the scope of the constitutional grant of jurisdiction, but it is conceded that its scope is determinable by the federal courts. Hence, Congress plays an important role in determining what matters are and are not within the scope of the power granted. But the states also may play some part in determining the content of the general maritime law, as shown by the portions of the opinions reproduced above from the cases of *Southern Pacific Co. v. Jensen, supra*, p. 216, and *United States v. Bevans*, 3 Wheat. 366, 388, 389. See also *The Lottawanna*, 21 Wall. 558, 578, 579; *The Hamilton*, 207 U. S. 398; *La-Bourgogne*, 210 U. S. 95, 138; *Western Fuel Co. v. Garcia*, 257 U. S. 233 and cases cited in *City of Norwalk*, 55 Fed. 98, 106.

The petitioners in the District Court made no effort to point out how the tax imposed by the Louisiana statute

changes or modifies the maritime law or interferes with its harmonious and uniform operation, there simply contenting themselves with saying that it does and that the federal courts have invalidated the workmen's compensation acts in so far as they relate to maritime employment and, hence, unemployment compensation acts must do so. Here, however, as in the Court of Appeals, as a pure afterthought, they say that the Louisiana statute, like other state unemployment compensation laws, not only taxes but uses the taxing power to actually regulate maritime employment by (1) providing a regulatory merit system by means of which stabilization of employment is to be attained by varying the tax on employers so as to reduce the rate on those whose employment record is good and to increase it on those who more frequently discharge or otherwise lose their employees, (2) by certain provisions of the statute imposing upon employers the duty of keeping records, making reports, and like provisions for the enforcement of the law usually found in taxing statutes, and finally (3) by requiring employers to collect the tax partly from their employees in the face of a federal statute requiring maritime employers to pay their employees in full within 48 hours after the wages are due.

The argument of the petitioners is based largely upon a non-existent state of facts. The Louisiana statute does not now contain and never contained any merit system. It solely provides that certain data shall be assembled by the Administrator and employment records kept by him for use in making reports to the Governor and the Legislature on the advisability of amending the law so as to provide at some future time a merit system with a fluctuating tax rate. Act 97 of 1936, Sec. 6, as amended by Act 164 of

1938 and by Act 11 of 1940. That section of the 1936 act, which contained a provision for future tax rates (Sec. 6(c)) by its terms provided that it would not become effective until January 1, 1941, (Sec. 6 (b) (4)) and the same section of the 1938 act, with respect to future tax rates (Sec. 6(c)), provided that such rates would not be effective until July 1, 1941 (Sec. 6(c) (3)). When the Legislature met in 1940, it amended Section 6 of the act by Act 11 of that year by eliminating the provision relative to future tax rates and substituting therefor as Sec. 6(c) the following:

> "The administrator shall investigate and study the operation of this act and actual experience hereunder with a view of determining the feasibility of establishing a rating system which would equitably rate the unemployment risk and fix the contributions to the fund of each employer and would encourage the stabilization of employment. The administrator shall submit his report and recommendations to the governor and the legislature."

It is evident, therefore, that the merit system provided for the future in the acts of 1936 and 1938 never became effective because the provision therefor was eliminated by the 1940 act before the effective dates provided in the former acts. That being true, there is now and has been since the year 1938 a fixed tax on employers of 2.7% of the wages paid (Sec. 6). The Court will also observe that the 1940 act makes no provision for any contribution by employees.

There is no necessity to discuss the argument of petitioners relative to the alleged regulatory features of the

statute since that argument is based upon a misconception of the contents of the law. If and when Louisiana adopts the so-called merit system the petitioners will have their day in court, but then they will have to contend with much unfavorable language in *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sp. Ct. 883, where much the same contention was made and rejected by the Court. There the Court said:

> "'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.' Sozensky v. United States, supra (300 U. S. 506). In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."

See also pages 593 and 594 where the Court said the inclusion of merit ratings in state unemployment acts is permissible.

As to the provisions relative to record keeping and reporting of the tax, it is sufficient to say that, if the tax is valid, so are the provisions for its enforcement. The other provisions complained of, relative to hearings, appeals, etc., do not affect employers but apply only to claims made by employees against the state.

The petitioners, therefore find themselves in the same difficult situation they were in the District Court where they were powerless to explain how the payment of unemployment insurance benefits to an unemployed claim-

ant by the state or contributions paid by an employer to a state fund for the payment of such benefits in any way alters or affects a maritime contract of employment. Certainly its payment by the State to an unemployed seaman of benefits could not affect the maritime law and, if the payment of the excise tax by the petitioners to the state would do so, it would follow that the state could not validly levy franchise taxes, sales taxes and numerous other state and local taxes, which the courts have upheld. Likewise, the fact that the wages paid is the measure of the tax imposed has no effect on the maritime law. The statute imposes obligations on the employer in favor of the state and not in favor of his employees, and the rights of these employees must be asserted against the state, not against the employer. None of the rights and liabilities under the maritime contract of employment are affected. *Beeland Wholesale Co. v. Kaufman, supra.* Mr. Justice Brandeis said in *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 125, 44 Sp. Ct. 274:

> "In no case has this court held void a state statute which neither modified the substantive maritime law, nor dealt with remedies enforceable in admiralty."

But we need not anticipate the reasons which the petitioners may give in support of their contention that the act is unconstitutional. The burden of showing that is upon them and that burden is not discharged unless they show clearly and beyond any reasonable doubt that the statute contravenes the substantive maritime law. *El Paso & Northeastern R. Co. v. Gutierrez,* 215 U. S. 87, 30 Sp. Ct. 21; *People v. Crane,* 214 N. Y. 154, 108 N. E. 427. They have failed to do this and it would indeed be difficult

for them to do so in view of the fact that the rights and liabilities created by the statute do not arise out of or in any way depend upon a maritime contract. The employer's liability is to pay a tax; the employee's rights are to receive benefits from the state when he becomes unemployed. Certainly a statute enacted for the beneficient purpose of curing the evils of unemployment and its resultant dangers to society should not be invalidated except for grave reasons. The views of Chief Justice Crane on this subject in the case of *Chamberlin v. Andrews*, 271 N. Y. 1, 2 N. E. 2d 22, are enlightening:

> "The fact is that in the past few years enormous sums of State and Federal money have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange kind of government, in fact no government at all, which could not give help in such trouble.
>
> "The Legislature of the State, acting after investigation and study upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the legislature or under the dole system the public at large pays the bill * * *.
>
> "I can see, therefore, nothing unreasonable or unconstitutional in the legislative act which seeks to meet the evils and dangers of unemployment in the future by raising a fund through taxation of employers generally * * *.

> "The peril to the State arises from unemployment generally not from any particular class of workers. So likewise, employers generally are not so unrelated to the unemployment problem as to make a moderate tax upon their payrolls unreasonable or arbitrary." (pp. 9, 10.)

It must be conceded, of course, that the statute would be invalid if it contravened the essential purpose of an act of Congress, or was materially prejudicial to the characteristic features of the maritime law, or interfered with the harmonious and uniform operation of the general maritime law; all as stated in the *Jensen Case*. The appellants appear to limit their attack on the statute on the basis of its alleged violation of the uniformity rule, which pre-supposes that the constitutional requirement of uniformity is an inexorable one in the silence of Congress on subject matter best adapted to local treatment.

Unlike the jurisdiction over interstate and foreign commerce, which is expressly granted in the constitution (Art. 1, Sec. 8, Cl. 3), the power of Congress over admiralty is in the nature of an implied constitutional grant. (Art. 3, Sec. 2.) *Do petitioners desire to assume the position that states are free to act on a matter where legislative power is expressly granted to Congress, in the absence of its exercise by Congress, but where the power in Congress exists by implication only, State action is prohibited?* Yet if they contend that the states are precluded from enacting legislation relative to maritime matters, it will be necessary for them to answer the above question in the affirmative.

Authorities are unlimited in support of the proposition that the states are competent to act despite an express grant of power to Congress where Congress either is silent or affirmatively encourages such State action and where the subject matter does not demand national and uniform treatment but is susceptible of local treatment or where local treatment is considered to be desirable because of the diversity of the local conditions to be regulated.

In the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sp. Ct. 729, 741, Mr. Justice Hughes said:

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the State should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities,

to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. *Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.* In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." (Emphasis ours.)

And on p. 399 (p. 740 of Sp. Ct. Reporter) it is said:

"It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. *In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act;* and, when Congress does act, the exercise of its au-

thority overrides all conflicting State legislation." (Emphasis ours.)

The unemployment problem is certainly one which involves the interest of a state in the health, safety, morals and welfare of its people. The theory behind the enactment of the Louisiana Unemployment Compensation Law is clearly consistent with this view. We quote Section 1 of said act:

> "Declaration of State Public Policy. As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. Unemployment is therefore, a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons."

It is a matter which clearly demands diversity of treatment according to the special requirements of local conditions.

In upholding a state law as not being in conflict with the Federal Constitution, which law provided that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots of a port for the use of the Society for the Relief of Distressed Pilots one half of the regular amount of pilotage payable, in the case of *Cooley v. Board of Wardens*, 12 How. 299, *318-319*, the Court said:

> "* * * But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, *like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.*" (Emphasis ours.)

> "Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national,

or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress; that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; * * *" (Emphasis ours.)

Despite Article 1, Section 8, of the Federal Constitution giving Congress power over interstate commerce, in the absence of conflicting legislation by Congress the States have invaded the field to a very great extent. Proof of this assertion comes from the following:

Laws requiring locomotive engineers to be examined and licensed by State authorities, *Smith v. Alabama,* 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry. v. Alabama,* 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Tel. Co. v. James,* 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia,* 163 U. S. 299, 304, 308; regulating the heating of passenger cars, *N. Y., N. H. & H. R. R. Co. v. N. Y.,* 165 U. S. 628; prohibiting railroad companies from contracting away liability for torts, *Chicago, Milwaukee & St. Paul R. R. Co. v. Solan,* 169 U. S. 133, 136, 137; prohibiting the transportation of diseased cattle in interstate commerce, *Mints v. Baldwin,* 289 U. S. 346; *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U. S. 613, 630, 635; *Reid*

v. Colorado, 187 U. S. 137, 147, 151; regulating the character of locomotive headlights, *Atlantic Coast Line R. R. Co. v. Georgia,* 234 U. S. 280; and the establishment of quarantine regulations, *Morgan's L. & T. R. & S. S. Co. v. Board of Health,* 118 U. S. 455.

At this juncture it might be well to note the reliance of petitioners in the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205. They discussed the *Jensen* case with the hope of establishing that Congress possesses exclusive jurisdiction to fix and determine the maritime law, which shall prevail throughout the country. That case, however, cannot be cited as authority against the enactment of an unemployment compensation law. On the contrary that case is authority for the proposition that where a subject is not national in its character and does not require uniformity of regulation, the state may act thereon in the silence of or at the invitation of Congress. We again quote from that case:

> "In view of this constitutional provision and Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by State legislation. *That this may be done to some extent cannot be denied.*" (Emphasis ours.)

More specific is the opinion in the case of *Just v. Chambers (The Friendship II),* 312 U. S. 668, 61 S. Ct. 687 (1941). There the Court said:

> "* * * a state in the exercise of its police power may exercise rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided the state action 'does

not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in international and interstate relations.'"

Since states have a right to legislate in the field of interstate commerce because of the inaction of Congress, *a fortiori*, Article 3, Section 2 of the Federal Constitution does not inhibit states from similarly invading the maritime field, and they have been permitted to do so.

Thus, in the realm of navigation, in the absence of exclusive legislation by Congress, the authority of the states to establish regulations effective with their borders has always been recognized (*Cooley v. Board of Wardens*, 12 How. 299, 320; *Steamship Co. v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNeil*, 13 Wall. 236, 241; *Wilson v. McNamee*, 102 U. S. 572; *Olson v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Court S. S. Co.*, 225 U. S. 187, 195); and States may construct dams and bridges across navigable streams notwithstanding that interference with accustomed navigation may result, in the absence of conflicting legislation by Congress, on the theory that local regulation is more suitable than national uniform treatment (*Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg, etc. Railroad*, 119 U. S. 280; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Manigault v. Springs*, 199 U. S. 473, 478). See also *Port Richmond, etc. Ferry Co. v. Hudson County*, 234 U. S. 317, 331 (State statute fixing tolls for transportation on interstate ferry). States may also

regulate wharfage charges and exact tolls on the instrumentalities of interstate commerce by water (*Keokuk Packet Co. v. Keokuk*, 95 U. S. 80; *Cincinnati, etc. Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691.) See also *County of Mobile v. Kimball*, 102 U. S. 691, 697 (harbor improvements); *Huse v. Glover*, *supra*, p. 548; *Cummings v. Chicago*, 188 U. S. 410, 427 (improvements and obstructions to navigation); and *Sands v. Manistee River Improvement Co.*, *supra*, p. 295 (tolls for use of an improved waterway).

As a result of the above discussion of authority, we may safely reiterate this conclusion: *States are competent to act despite an implied or expressed grant of power to Congress where Congress is either silent or affirmatively encourages such state action and where the subject matter does not demand national and uniform treatment but is susceptible of local treatment or where local treatment is considered to be desirable because of the diversity of local conditions to be regulated.* If state legislation may supplement the maritime law in the absence of action by Congress, and the subject matter appears to be appropriate for local treatment, certainly unemployment insurance legislation neither affecting, modifying nor supplementing the general maritime law is valid.

Congress had not passed any unemployment compensation laws applicable to maritime workers. On the contrary, it invited the States to enact legislation in the field of unemployment insurance in Titles IX and III of the Social Security Act and thereby placed itself on record

that the subject may be best dealt with by state legislation. It did this by imposing in the Social Security Act a tax which would induce the states to pass unemployment insurance laws but stipulated therein no provisions which the states should enact, leaving them free to determine what employers and what employees should be affected. So much is said in "Unemployment Compensation, What and Why", published by the Social Security Board in 1937 (Publication No. 17), from which we quote the following:

> "The Social Security Act as described in the preceding chapter establishes a Federal-State cooperative system of unemployment compensation which leaves to the States the power and initiative of passing unemployment compensation legislation and permits them wide latitude with regard to the type of plan they wish to establish. * * *
>
> "Except for these requirements (minimum criteria for approval of the State law as a bona fide unemployment compensation law, and which safeguard its due and proper administration) the Federal Government does not restrict the freedom of the States to set up any type of unemployment compensation system they desire. Basic and fundamental policy decisions are left entirely in the hands of the State. It must designate the groups to be protected and those to be excluded. It is free to add or not to add employer contributions to the system if it so desires, * * * Likewise, it determines its own benefit rates, waiting period, amount and duration of benefits, the conditions under which the unemployed covered individuals may receive benefits, and the administrative arrangements necessary for the operation of the system."

And the same view was taken by the Supreme Court in the case of *Steward Machine Co. v. Davis, supra,* in which it was said:

> "'* * * A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York and elsewhere. *They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience.* Cf. Sections 909, 910. * * * *They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all.* This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. *Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute.'"* (pp. 593, 594.) (Emphasis ours.)

And again in *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co.,* 2 S. E. (2d) 584, the Supreme Court of North Carolina said in 1939:

> "* * * there are numerous variations apparent in the respective state unemployment compensation acts. *Such variations in the State Laws and the*

interpretations given them are but reflections of the considerable latitude necessarily allowed the individual states to the end that they may work out compensation acts suited to their own peculiar needs." (Emphasis ours.)

In Senate Report No. 628, Cal. No. 661, 74th Congress, the Committee of Finance said at page 14:

"There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the *Federal Government should not attempt to dictate to the states which type of compensation law they should adopt.* The amendment we suggest to the House Bill will eliminate all such dictation *and leave the states free to decide for themselves which type best suits their local conditions.*" (Emphasis ours.)

And in its report to the President (U. S. Gov. Printing Office, 1935) the President's Committee on Economic Security said at page 4:

"We believe further that the Federal Act * * * should leave wide latitude to the states * * * *as we deem experience very necessary with particular provisions of unemployment compensation laws in order to conclude what types are most practicable in this country.*" (Emphasis ours.)

The necessity for local treatment of unemployment compensation is pointed out by the Social Security Board in its publication "Unemployment Compensation, What and Why", above referred to, in its discussion of the problems presented to legislatures of the several states under the

following headings: (1) "Who shall be covered?"; (2) "Who shall contribute?"; (3) "What type of fund shall be established?"; (4) "What kind of employment shall be compensated?"; (5) "How long shall the waiting period be?"; (6) "What shall eligibility for benefits depend on?"; (7) "Shall any periods of involuntary unemployment be compensated?"; (8) "How large shall the benefits be?"; (9) "How shall unemployment compensation be administered?"

Manifestly, where opinions on such a subject, dealing with the proper provisions of an unemployment compensation law, differ so widely so as to meet widely different conditions and situations in the several states unemployment insurance necessarily demands local treatment.

It is contended by petitioners that section 1607 (c) (4) of the Internal Revenue Code as amended (originally section 907 (c) (3) of the Social Security Act) is an unequivocal expression by Congress that members of the crews of such vessels (dredges) are not to fall within the scope of (State) unemployment compensation legislation; that this is further evidenced by administrative rulings of the Bureau of Internal Revenue; that practical considerations lead to the same conclusion and that the principle of uniformity in the maritime law forbids state action. These contentions will be briefly discussed *seriatim*.

In the first place, petitioners state that Congress has provided directly that members of the crews of vessels on the navigable waters of the United States are exempt from provisions of the Social Security Act and infer that this

act is a federal unemployment compensation statute. There is, of course, no such statute and petitioners' inference that titles III and IX of the Social Security Act constitute an unemployment compensation statute might convey the impression that the Federal Government has, in fact, entered into the field of unemployment compensation generally. If petitioners were correct in that view, it would be possible for them to argue, with hope of success, that the Louisiana legislature has undertaken to legislate in a field in which Federal jurisdiction is exclusive and that the effect of the State law is to disturb the uniformity of the Federal law on unemployment compensation. In support of its view, the plaintiffs could invoke the doctrines expressed by the *Jensen Case*, the *Knickerbocker Ice Co. Case* and the *Dawson Case*, claiming that they were directly applicable to the issues under dispute.

The facts being entirely different than suggested by petitioners, it would seem that their argument should fail. In no true or fair sense can it be said that titles III and IX of the Social Security Act constitute an unemployment compensation law. Title III only authorized Federal grants to defray the expenses of administration of unemployment compensation laws to States whose laws meet prescribed standards. Title IX levied a tax on the exercise of the privilege of employment, the proceeds of which were to be paid into the Federal Treasury. It provided for a credit, not to exceed 90% of the amount of the tax payable, based on contributions paid to a State under a State unemployment compensation law which conformed to prescribed minimum standards. Title IX did not contain any provisions such as the Louisiana law under con-

sideration describing the conditions of eligibility for benefits, conditions of disqualification, rate and duration of benefits, and related matters. The administrative agency set up under the Federal act, the Social Security Board, had no power to administer a system of unemployment compensation. Its powers were limited to the approval of State laws, assistance in the coordination of the activities of Federal and State agencies and research in the field of the social sciences for the purpose of assisting Congress in formulating policies in connection with social security legislation.

It would seem to be accurate, therefore, to state that the Federal Government has exercised its privilege to abstain from assuming its constitutional jurisdiction in the field of unemployment compensation and has clearly evidenced a desire that the States undertake the responsibility of legislation with respect to that subject matter. This general statement is subject to one exception: In the field of interstate transportation, Congress has not seen fit to leave it to the States to enact and administer unemployment compensation laws and has taken the customary action to evidence its assumption of exclusive constitutional jurisdiction, namely, positive legislation. In the Federal Railroad Unemployment Insurance Act, approved June 25, 1938, Congress appears to have unequivocally asserted its jurisdiction over the field of unemployment compensation as it might apply to carriers and their associated facilities and to their employees, and thereby effectively barred State action covering that subject matter. No such action was taken with respect to maritime employment.

It is most significant that in the Report to the President of the Committee on Economic Security (Government Printing Office, 1935) upon which the subsequently enacted Social Security Act was based, it was said:

> "We are opposed to exclusions of any specified industries from the Federal act, but favor the establishment of a separate nationally administered system of unemployment compensation for railroad employees and maritime workers."

Thus it would seem, that at the time of the enactment of the original Social Security Act in 1935 it was contemplated that the Federal Government, in the future, would enter upon the field of unemployment compensation with respect to two classes of employees. The fact that positive action has been taken with respect to railroad workers and that no further action has been taken with respect to maritime workers leaves one with the conclusion that Congress has either been silent in the maritime field or has indicated its lack of objection to State action. The fact that Congress, up to the present time, has failed to enact a Federal System of unemployment compensation for seamen and maritime workers is further evidenced by the lack of success which has attended efforts to obtain such legislation. In the 76th Congress, 1st Session, there was introduced a bill entitled H. R. 2553 which was referred to the Committee on Ways and Means; in the 3d Session of that Congress, there was introduced H. R. 9798 which was referred to the Committee on Merchant Marine and Fisheries. Although hearings have been held on the latter bill, both bills still remain in committee.

The most plausible argument that can be made by the petitioners is that by exempting from a Federal taxing statute "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States" (section 907 (c) (3)) Congress has declared to the States that the Federal Government alone is competent to enact an unemployment compensation law with regard to individuals who were in maritime employment. But this is tantamount to saying that a failure or refusal to exercise jurisdiction may be taken to signify positive and affirmative assumption of jurisdiction. This, however, would seem to be unsound. If Congress had the intention ascribed to it by petitioners, it undoubtedly would have taken action which affirmatively and unequivocally indicated its intention to deny to the States entrance upon the field of unemployment compensation as applied to maritime employment. Thus, when the Federal Government entered the field of unemployment compensation with respect to employees of interstate carriers, it made the following affirmative declaration of jurisdiction in the Railroad Unemployment Insurance Act:

> "By enactment of this Act the *Congress makes exclusive provision for the payment of unemployment benefits for unemployment* occurring after June 30, 1939, based upon employment (as defined in this Act). No employee shall have or assert any right to unemployment benefits under an unemployment compensation law of any State with respect to unemployment occurring after June 30, 1939, based upon employment (as defined in this Act). The Congress finds and declares that *by virtue of the enactment of this Act, the application of State unemployment compensation laws after June 30, 1939, to such employment,*

> *except pursuant to section 12 (g) of this Act, would constitute an undue burden upon, and an interference with the effective regulation of interstate commerce.* In furtherance of such determination, after June 30, 1939, the term 'person' as used in section 906 of the Social Security Act shall not be construed to include any employer (as defined in this Act) or any person in its employ: *Provided,* That no provision of this Act shall be construed to affect the payment of unemployment benefits with respect to any period prior to July 1, 1939, under an unemployment compensation law of any State based upon employment performed prior to July 1, 1939, and prior to such date employment as defined in this Act shall not constitute 'Service with respect to which unemployment compensation is payable under an (or "service under any") unemployment compensation system (or "plan") established by an Act of Congress' (or 'a law of the United States') or 'employment in interstate commerce, of an individual who is covered by an unemployment compensation system established directly by an Act of Congress,' or any term of similar import, used in any unemployment compensation law of any State." (Section 13(b) Railroad Unemployment Insurance Act.) (Emphasis ours.)

It is difficult to understand how such a theory as petitioners advance can be based upon a mere exemption in a Federal Revenue Law.

If it be asked, then, what purpose the exemption served, the answer would not seem to be difficult. There is excepted from the definition of "employment" and, therefore, from the application of the tax imposed by title IX, services performed in agricultural labor, services per-

formed for charitable, educational and scientific institutions, services performed as an officer or member of the crew of a vessel on the navigable waters of the United States, etc. These exclusions were dictated by various reasons of congressional policy. In some instances, the exclusion is based upon administrative convenience. In others, it is a desire either to foster or aid the organizations for which such services were performed or the industry to which they belonged. But, in classifying those who would be covered by title IX of the Social Security Act, Congress in no wise intended to fix or determine the limit of coverage of the types of service to which a State might wish to apply an unemployment compensation law. Thus, the exemption from the application of the Federal tax of "Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States" has not operated to prevent the States of Colorado and New York from passing unemployment compensation laws without any reference to the Federal exclusion. Furthermore, it has not prevented the State of Louisiana from making a substantial modification in the language of the exemption in the Federal Act. State unemployment compensation laws have varied in their coverage to a considerable extent from that prescribed by the Federal Tax Statute. These variations are evidence of the fact that the States as well as the Social Security Board, who approved these State statutes, thought that Congress had no intention whatsoever that State statutes should follow the Federal example in regard to the exclusions in the Federal Act. Congress, in Section 907 (c), was merely expressing its own intentions with respect to the application of a Federal Revenue law and was indicating no disposition

whatsoever with respect to the permissible scope of coverage under a State law of maritime workers or seamen.

By excepting service of officers and members of a crew of a vessel on the navigable waters of the United States from the definition of "employment" and thereby exempting employers of such service from the application of the Federal tax, Congress, in effect, took no position with respect to coverage by the States of maritime workers. It took no action on the question of jurisdiction and left the question where it was prior to the enactment of the Social Security Act. If prior to that date, under the exercise of its police powers, a State might require employers of individuals performing maritime services to contribute to a special fund dedicated to the payment of benefits to unemployed individuals, including their own, they could do so after that date.

Plaintiffs refer to a ruling of the Bureau of Internal Revenue issued in January 1937 (cited as XVI-4-8504, SST 78). Presumably, reference is made to that ruling to support the contention that by virtue of the exemption of services performed by officers and members of a crew of a vessel on the navigable waters of the United States from the Federal tax, Congress "pre-empted" the field. It is doubtful that the administrative ruling cited is competent to shed light upon the extent to which, in the Social Security Act, Congress has positively entered into the field of unemployment compensation for maritime workers or has positively prohibited such action to the States. The statute would seem to speak for itself in that regard. But even assuming that in that connection the administrative ruling carries weight, it is submitted that it does not

stand for the proposition advanced. It is readily conceded that it declares that dredges used for navigation and transportation in deepening and removing obstructions from channels and harbors are "vessels". The headnote preceding the ruling so states. The ruling, however, does not purport to answer more than this question:

> "Advice is requested whether dredges are 'vessels' * * *."

A careful reading of the ruling will reveal that there is no consideration whatsoever given therein to whether the services were performed by officers or members of a crew. The ruling merely holds that where officers and members of a crew perform services on such vessels under certain circumstances, the services are excepted from the coverage of the Federal act. Indeed, the ruling does not even describe the nature of the services performed by the individual on the dredge.

The plaintiffs made no mention of SST 336 (Internal Revenue Bulletin, 1939-1, p. 300) in which ruling the Bureau of Internal Revenue held that lighter captains, scow captains, bargemen and other individuals performing services on board non-self propelled lighters and barges (held to be "vessels") are *not* officers and members of the crew within the meaning of the exemption from the Federal act. The services performed by the individuals referred to in the ruling, as described therein, appear to be similar to those performed by plaintiffs' employees. The decision makes it clear that the services were performed on vessels on the navigable waters of the United States. Thus, we have an instance of an agency of the

Federal Government holding that individuals performing work similar to that rendered by plaintiffs' employees are *not* within the exemption of the Federal taxing statute. If weight is to be given to the rulings of that Bureau in seeking to ascertain the legislative intention, it would appear that SST 336 demonstrates that it was *not* intended by Congress, when it enacted the Social Security Act and exempted services by officers and members of a crew of a vessel on the navigable waters of the United States that the Federal Government should assume jurisdiction over the field of unemployment compensation as applied to such workers as are described in SST 366 or in the complaint herein, nor that the States should be forbidden to trespass on that field.

The petitioners rely upon the case of *Buckstaff Bathhouse Co. v. McKinley*, 308 U. S. 358, 60 Sp. Ct. 279, to support their contrary view. While there may be a statement in the opinion there from which the inference may be drawn that the exceptions from the term "employment" in the State unemployment compensation acts should conform to those contained in the Social Security Act, that question was not directly involved in the *Buckstaff* case. The question was solely whether an Arkansas corporation operating a bathhouse on a government reservation for profit under a lease from the Secretary of the Interior was an instrumentality of the United States exempt from the tax levied by the Social Security Act. Both the federal and the state statutes exempted such instrumentalities and there was no question involved as to any variance between the two statutes.

The Court said that the federal act was an attempt to find a method by which the states and the federal government could "work together to a common end"; that before many states "held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors", as pointed out in *Steward Machine Co. v. Davis*, 301 U. S. 588, 57 Sp. Ct. 891, but, as further pointed out in that case, the federal statute does not require a surrender by the states of powers essential to their quasi-sovereign existence.

In the *Buckstaff* case the Court further said that:

> "The exclusion of federal instrumentalities from the scope of the Federal act, and hence from the complementary State systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from State taxation."

The employers in the case at bar do not come within the class of employers immune from state excise taxes.

If the *Buckstaff* case did appear to suggest that the states should confine their coverage in their unemployment compensation acts to that of the Social Security Act, the action of the legislatures and the decisions of the courts in the meanwhile evidence a view that the Court intended the suggestion not as a prohibition. There are a number of adjudications, in addition to the *Cassaretakis* case, *supra*, which hold that the coverage of a state unemployment compensation law and that of the Social Security Act need not necessarily be the same. *Shore Fisheries v. Board of Review*, 127 N. J. L. 87, 21 Atl. 2d 634; *Capitol*

Building & Loan Association v. Kansas Commission, 148 Kans. 446, 83 P. 2d 106; *Fidelity-Philadelphia Trust Co. v. Hines*, ... Pa. ....., 10 Atl. 2d 552; *Jefferson Standard Life Insurance Co. v. North Carolina Unemployment Compensation Commission*, 215 N. C. 479, 2 S. E. 2d 584. These cases uniformly reject the argument that the coverage of a state law must necessarily be co-terminous with that of the federal act in cases involving the employment relationship and exemptions by type of service. The argument is supported further by the wide variety of exclusions of various types of service in which state acts differ from the federal act.

8 George Washington Law Review 990, 992-993 has this to say about the *Buckstaff* case:

> "The instant case also carries the suggestion that if the class of which petitioner is a member had been excluded from the Federal Act, such class would have been saved from the 'reciprocal state systems'. While it is conceivable that Congress might *prohibit* states from covering under their laws those associated with the Federal government in the same manner as the petitioner here; cf., *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 90, Sp. Ct. 15, 84 L. Ed. 16 (1939); this situation seems quite different from that in which Congress might *merely choose* to exclude the petitioner's class from the provisions of the Federal Act. It seems reasonably clear that *such an exclusion alone would not necessarily deny the states the power to include under their laws persons such as those independently contracting with the United States who are not constitutionally immune. The provisions in state laws clearly intend a broader coverage than that of the Federal Act.* Some state laws, by covering em-

ployers of but one or more, and most by different definitions of 'employer' and 'employment' than those of the Federal Act, see C. C. H., Unemployment Insurance Service, obviously have broader coverage than title IX of the Federal Act and have been so recognized by the courts, Colorado Industrial Comm. v. Northwestern Life Ins. Co., 103 Colo. 550, 88 P. (2d) 560 (1939); North Carolina Compensation Comm. v. City Ice & Coal Co., 216 N. C. 6, 3 S. E. 2d 290 (1939), and *the instant opinion would not seem to suggest* in any sense a requirement *that states confine their coverage to that of the Federal Act.* Cf., Carmichael v. Southern Coal & Coke Co., supra, at page 512." (Emphasis ours.)

The petitioners advanced the argument that the uniform operation of the maritime law is interfered with by the Louisiana statute because the vessels upon which the services under consideration were performed are not employed continuously within a single state and periodically enter various jurisdictions in the course of their normal operations. This argument, of course, assumes that the subject of unemployment compensation is one which in its nature must be uniformly prescribed and administered. The Supreme Court of the United States, in the *Jensen* case, the *Knickerbocker Ice Company* case and the *Dawson* case, so conceived the rights and remedies of maritime employers and employees insofar as tortious acts are concerned, but this does not mean that that Court would hold that the uniformity conceived to be essential in field of maritime insurance is also essential in the field of unemployment compensation. Indeed, the very existence of a federal-state system argues to the contrary and evidences a legislative judgment that unemployment compensation be

conceived and administered upon a local basis. An exception should be noted, of course, in the case of interstate railroad workers but, in that situation, the Congress saw fit to enact positive legislation in order to assure that the requirements of uniformity will be served. Thus far, however, it does not seem to have deemed it necessary to legislate with respect to maritime workers.

In challenging the respondent's statement that the Congress in the enactment of the Federal Social Security Act, recognized the constitutional right of the state to enact unemployment compensation legislation as to maritime employment by inviting the states to legislate thereon, the petitioners argued below that the fallacy of this statement is evidenced by the fact that no state except Louisiana has accepted the alleged invitation by any attempt to extend such legislation into the maritime field. This statement is misleading in that it infers that, if a State unemployment compensation law does not make specific reference to maritime employment in its coverage provisions, it must necessarily mean that the legislature did not intend to have the law apply to such employment. An examination of the unemployment compensation laws of the many jurisdictions in which such laws have been enacted discloses that the coverage of these laws is expressed in general terms and no effort was made by the enacting legislatures to designate those industries which were to be subject to the laws. Therefore, the failure to provide *affirmatively* that maritime services such as are involved in this case are within the coverage of the act cannot be taken to evidence a legislative intention to exclude them. This position is subject to one qualification, namely, that a legislative intention to exclude an industry

or a type of service may be evidenced in a *negative* manner by a specific exception thereof from the definition of employment. Thus, an exception of services performed by officers and members of the crew of a vessel on the navigable waters of the United States, etc., would exempt individuals performing such services from the application of the act, but would not exempt others engaged in the field of maritime jurisdiction who, for example, were not members of a crew. It may be conceded that services performed by officers or members of the crew of a vessel on the navigable waters of the United States are exempted from the operation of most of the State laws and such services would be excepted from the operation of the Louisiana law only where the vessel is "customarily operating between ports of this State and ports outside this State." (Section 18(g) (6) (C).) It is respondent's contention, however, that the services involved in this case were not performed by officers or members of the crew of a vessel so operating and that, therefore, the exception does not apply.

Indeed, despite the lack of any specific reference in the coverage provisions of their unemployment compensation laws to services within the maritime jurisdiction of the United States, the States of Oregon, Missouri, Iowa, New York and New Jersey, in addition to Louisiana, have construed their laws to be applicable to maritime services of a type which the petitioners argued cannot be touched by State unemployment compensation legislation. See especially, *Claim of Cassaretakis* (New York), 44 N. E. 2d 391. The commissions administering the unemployment compensation law in Iowa and Missouri held that services of

individuals on barges in connection with the laying of mats on river banks were covered by the respective State Laws (see *Decision No. 39 C-8 dated July 18, 1939, of the Iowa Commission and Decision No. C-167 dated June 8, 1940, of the Missouri Commission). The Oregon Commission in Decision No. 39-C-24 dated August 10, 1939,* held that workers on a drill barge on the Columbia River were covered by the State law (see also *Puget Sound Bridge & Dredging Co. v. State Unemployment Compensation Commission,* 126 P. 2d. 37). *The Appeal Board of the New York agency in case No. 132-38 (550-14-38R) dated September 28, 1938,* held that workers on a dry dock floating on the navigable waters of the United States were covered by the State law which contained no reference whatsoever to maritime employment either in the positive provisions dealing with coverage or in the exceptions to the meaning of the term "employment"; and the *New Jersey Board of Review in Docket No. BR-1328 dated September 16, 1940, and Docket No. BR-1338 dated September 30, 1940,* held that sound fishermen were covered by the State law. These decisions, among others, evidence a view with respect to the construction of State unemployment compensation laws contrary to that expressed by the petitioners and demonstrate an understanding that the unemployment laws are applicable to certain types of maritime work notwithstanding the absence of any positive provision referring to services of that nature.

VI.

EMPLOYEES OF DREDGING CONCERNS DO NOT COME WITHIN THE EXEMPTION PROVISIONS OF UNEMPLOYMENT INSURANCE STATUTES EXEMPTING OFFICERS AND MEMBERS OF THE CREW OF A VESSEL OPERATING ON PUBLIC NAVIGABLE WATERS.

The petitioners cite numerous cases holding that employees engaged in dredging operations are members of the crew of the dredge used in such operations. Each case dealt with some statute which sought to bring these employees within its provisions, but the petitioners have cited none where such employees were *excluded* from the operation of a statute because they were members of the crew, and our recollection is that none of the cases involved a state tax, and certainly not an unemployment insurance tax.

The administrative departments set up by the unemployment compensation statutes of the several states have had occasion to define, in the light of such statutes, those who are officers and members of the crew of a vessel navigating the public waters, and in each of these cases, unlike the Louisiana statute, the unemployment compensation statute of that State specifically and unrestrictedly exempted from its operation officers or members of the crew of such vessels. It must here be remembered that the Louisiana statute merely exempts:

> "Service performed as an officer or member of the crew of a vessel on the navigable waters of the

United States *customarily operating between ports in this State and ports outside this state.*" (Emphasis ours.) Sec. 18 (g) (6) (e) of Act 97 of 1936, as amended.

Thus, OREGON by decision of its referee January 25, 1940, No. 40-RA-16, decided that a craneman on a vessel lying in navigable waters whose service was in connection with excavating a channel and mooring basin for a permanent berth of a battleship, but whose general employment and activities do not have any direct relation to commerce or navigation was not a member of a crew. SOUTH CAROLINA'S opinion of the Attorney General dated October 12, 1939, entitled Legal Opinion No. 100, held barge captains on non-self propelled barges whose work is of a nature unassociated with the operation and movement of a vessel from point to point as an agency of transportation are in "subject employment" (did not come within the exemption definition of an officer or member of a crew) even though he may have incidentally and occasionally been connected with activities usually associated with those performed by a member of a crew. CALIFORNIA'S Division of Employment Commission in an opinion entitled Commission No. 94, on December 2, 1939, declared that a claimant who operated a pneumatic pump on a non-motive power barge located on navigable waters for the purpose of reclaiming oyster shells was not an officer or member of the crew of a vessel. In a decision of the appeal tribunal of the State of IOWA, dated April 1, 1940, entitled No. 40 A-894-CM, it was held that services as a mat weaver performed on barges along the shores of a river were not in exempt employment. The appeals tribunal of KANSAS on March 19, 1940, in an opinion en-

titled Appeal No. 101, declared that services upon Matt barges and rock barges used in river improvement work were not in exempt employment. The Board of Review of the State of NEW JERSEY, Docket No. BR-1994, on April 3, 1940, officially declared that a person in charge of a fishing boat operating in territorial waters of the United States should be held as not exempt as maritime employment when he was not required to be a seaman in order to operate the boat. The appeals tribunal of the state of WEST VIRGINIA on February 8, 1940, No. AT 999, held that a *pumper, fireman, two deck hands and engineer employed on a non-motive power dredge engaged in taking sand and gravel out of a river and not for transportation of either passengers or freight were not officers or members of the crew of a vessel on the navigable waters of the United States.* FLORIDA'S Decision of Appeal Tribunal dated June 16, 1939, Appeal Decision No. 38, in declaring services of certain workers on a canal dredge to be in covered employment stated that workers who are engaged in dredging operations of a dredge whether it be from the bottom of a river channel or not, are not members of the crew.

In the case of *Puget Sound Bridge and Dredging Co. v. State Unemployment Compensation Commission, et al.*, decided by the Circuit Court of Oregon, Fourth Judicial District, Department No. 2, on October 31, 1940 the defendant-claimant was engaged in work on a drill barge on the Columbia River. Section 2 (F) (4) of the Oregon Unemployment Law read as follows:

> "The term 'employment' shall not include services performed as an officer or members of the crew of a

vessel on the navigable waters of the United States." (Chapter 70 Laws of 1935 as amended.)

In order for defendant to recover it was necessary for him to show that he was not a "member of the crew" of a vessel within the act. Holding that defendant was not a member of the crew, the court declared:

> "In my opinion defendant Sedoris was not a member of the crew. His lifelong occupation had been work on pile drivers, bridges and general construction. His essential duties were in no wise related to 'navigation, operation, welfare or maintenance' of the *vessel*. He contributed nothing toward these maritime essentials. He fired boilers not for propulsion, but for the operation of drills used for dredging. True, a part of the power so generated was used in the occasional operation of winches in changing the vessel's position, the movement being about 5,500 feet in something over two years. A like use was available for pumping water, but the evidence fails to show such actual use. These matters, however, were mere incidents to the primary employment, inconsequential in extent and of little significance in determining the status of claimant as a member of the crew. This incidental and casual work has little, if any, relationship to navigation, operation, welfare or maintenance."

This district court decision was affirmed on appeal by the Supreme Court of the State of Oregon (126 P. 2d. 37), in which the Court said:

> "(12) We inquire, however, what has been the construction of the term 'crew' as declared by the federal courts? The United States Supreme Court has not determined the question. The decisions of the

various district, federal and intermediate courts of appeal are in conflict. Columbia L. Rev. Vol. 41, p. 1217; Tulane L. Rev., Vol. 15, p. 241. The interpretative decisions of federal administrative boards and commissions—which are only persuasive and not controlling—are likewise far from being in accord. In the light of such divergence of opinion, this court feels free to use its own judgment and will be guided by what it considers the better reasoned cases.

"(13) In order that the services performed by an individual upon a vessel on navigable waters of the United States be excluded from coverage under the unemployment compensation law, it must be shown that such services substantially tend to promote the welfare of the vessel as an agency of navigation. *It is not sufficient only to show that such services are incidental to navigation.* South Chicago Dock Co. v. Bassett, supra; DeWald v. Baltimore & Ohio R. Co., 4 Cir., 71 F. 2d 810; Diomede v. Lowe, 2 Cir., 87 F. 2d 296; Moore Dry Dock Co. v. Pillsbury, 9 Cir., 100 F. 2d 245; Hawn v. American S. S. Co., 2 Cir., 107 F. 2d 999; Shore Fishery v. Board of Review of U. E. Comm., 127 N. J. L. 87, 21 A. 2d 634, 636; The Bound Brook, D. C., 146 F. 160; The Buena Ventura, D. C., 243 F. 797. See well-considered opinion of General Counsel for Unemployment Commission of South Carolina, State Series, Vol. 2, No. 1, U. C. I. S.—1002 S. C. (Emphasis ours.)

"We are not unmindful that the United States Supreme Court in South Chicago Dock Co. v. Bassett, supra, decided February 26, 1940, had under consideration the Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. §901 et seq., and not an unemployment compensation act, but its discussion of the ex-

emption clause with reference to 'master or member of a crew of any vessel' in the act is nevertheless illuminating, even though difficult to reconcile with what the court said concerning the term 'seamen' in Ellis v. United States, 206 U. S. 246, 27 S. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, with four justices dissenting. In the Bassett case, the court, in holding that the employee injured was not a member of a 'crew', quoted with approval from The Bound Brook, supra, wherein the term was thus defined:

> " 'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board.'

"The court also quoted from The Buena Ventura, supra, wherein it was said in substance that one who served the ship 'in her navigation' was a member of the 'crew'.

"None of the above cited cases, excepting that of Shore Fishery Co. v. Board of Review of U. E. Comp. Comm., supra, involve construction of unemployment compensation acts and are, therefore, not authorities on the precise question under consideration, but the same may be said concerning Saylor v. Taylor, supra; Maryland Cas. Co. v. Lawson, 5 Cir., 94 F. 2d 190; Kibadeaux v. Standard Dredging Co., 5 Cir., 81 F. 2d 670, cited by appellant."

It is contended that the decision in the case of *Gale v. Union Bag & Paper Corporation*, 116 F. 2d 22, cannot be reconciled with the ruling of the Court in the *Puget Sound Bridge* case. We think that the *Gale* case is

distinguishable from that case and also, of course, from the case at bar. The *Gale* case arose under the Fair Labor Standards Act of 1938 which exempted "seamen". Neither the Longshoremen's and Harbor Workers' Act nor the Louisiana Unemployment Insurance Act exempt seamen. Your Honors said:

> "The master or a member of a crew of any vessel is excluded from the provisions of the act (Longshoremen's and Harbor Workers' Act); 'seamen' are not. In each case the decision turned on the point that the employee was neither the master nor the member of a crew of a vessel.
>
> "* * * It is plain that it was not the intention of Congress to exclude a person who might be considered a seaman within the ordinary meaning of the word from the benefits of the act unless he were the master or a member of a crew of a vessel."

The Court properly concluded that, inasmuch as the *Longshoremen's and Harbor Workers'* cases involved an exemption which differed in language and scope from that set out in the Fair Labor Standards Act, the cases construing the exemption in the Longshoremen's and Harbor Workers' Act would have no application to the case before it. Similarly it can be argued by respondent that, inasmuch as the *Gale* case concerned a statute exempting "seamen" and not "officers or members of a crew of a vessel on the navigable waters of the United States" etc., the determination of the scope of the exemption in the *Gale* case is irrelevant to any determination of the scope of the exemption in the Louisiana Unemployment Compensation Law. Furthermore, it should be observed that the opinion in the *Gale* case rests heavily upon the legislative intention in so far as the restriction of hours of work provided

for in the Fair Labor Standards Act is concerned. The Court points out that to restrict the work of individuals performing services on barges to 40 hours per week "would greatly interfere with the operation of such means of transportation." It indicates that as a consequence of the application of the hours provision in the Fair Labor Standards Law to the services there involved "probably barge tenders would not be employed at all." Thus, the Court had in mind administrative considerations bearing upon the interpretation of the Fair Labor Standards Act which are wholly irrelevant to a construction of the scope of the coverage of the Louisiana Unemployment Insurance Law.

All of the above mentioned rulings cited by respondent have been made under the unemployment compensation statutes of states possessing a provision for the exemption from coverage of officers or members of the crew of vessels operating on the navigable waters of the United States. As can readily be observed, notwithstanding such exemptions, employees of dredge boats and similar watercraft have been held to be subject employees under the unemployment insurance statutes of these states. If employees of dredge boats are not considered exempt in states having a provision in their unemployment insurance statutes exempting officers and members of the crew of a vessel, *a fortiori*, employees of dredge boats are subject to the Louisiana Unemployment Compensation Act, which only exempts officers and members of the crew of a vessel which customarily operates between ports in and outside the jurisdiction of the State of Louisiana. Since petitioners have admitted that their dredges do not customarily so operate, under the decisions of the states above

enumerated their employees certainly are subject employees under the Louisiana Unemployment Compensation Law which contains no exemption in their favor. On the basis of the above stated authority, this would be true even if the Louisiana statute would not include the phrase "customarily operating between ports in this state and ports outside this state."

It appears that whenever courts have been confronted with the proposition of whether or not to exempt a seaman from the operation of a statute, they always narrow the definition so as to only allow those persons generally considered as seafaring men to become excluded from its operation. Consistent with this declaration is the case of *Moore Drydock Company v. Pillsbury, 100 Fed. (2d) 245.* We quote from page 246 of that case:

> "Although the courts thus far have not formulated a precise statement from which it can at once be determined just when an employee is a member of a crew and when he is a harbor worker, they are in agreement upon the principle that Congress, in the enactment of a longshoremen and harbor workers' compensation act, intended to except from the operation thereof only those employees ordinarily and generally considered as seafaring men, leaving that case to be determined by the circumstances of each case."

It is needless to cite authority in support of the universal rule that exemptions from taxation are strictly construed against those claiming the exemption. If the petitioners are entitled to any exemption from the payment of the tax imposed by the Louisiana statute, which we deny, it is up to them to show clearly the extent of their rights in that

respect. They have chosen to assume that the services rendered by all of their employees come within the exemption they claim and they, not the respondent, bear the burden of clear and positive proof in that respect.

If the Court agrees with our view that the right to impose excise taxes inheres in a state and was reserved to the several states by the Constitution, subject only to such limitations as the 14th Amendment provides, then the statute here involved must be upheld. If, on the other hand, that view does not prevail, we think we have shown that the statute in question in no way affects any maritime contract or enlarges or limits any rights enjoyed by the parties to any such contract, or is in any way prejudicial to the general maritime law, or in any way interferes with the proper harmony and uniformity of that law. The acceptance of that view alone would reject the only argument the petitioners make and would compel a decision upholding the constitutionality of the statute and affirming the decision of the District Court and that of the Circuit Court of Appeals.

Respectfully submitted,

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Of Counsel.

April, 1943.

APPENDIX.

ACTS

STATE OF LOUISIANA

REGULAR SESSION

1938.

Act No. 330.

House Bill No. 568. By Mr. Sevier.

AN ACT

To amend and re-enact Act 16 of the Second Extraordinary Session of 1934 (amended by Act 23 of the Second Extraordinary Session of 1935) entitled, as amended, "An Act to carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him."

Section 1. Be it enacted by the Legislature of Louisiana, That Act 16 of the Second Extraordinary Session of the Legislature of 1934, (amended by Act 23 of the Second Extraordinary Session of 1935) be amended and re-enacted so as to read as follows:

AN ACT

To carry into effect Section 18, Article X of the Constitution of Louisiana, and to provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him.

Section 1. Be it enacted by the Legislature of Louisiana, That no court of this State shall issue any process whatsoever to restrain the collection of any tax imposed by the State of Louisiana, or by any political subdivision of the State of Louisiana, under authority granted to it by the Legislature or by the Constitution.

Section 2. (a) A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the officer designated by law for the collection of the said tax and shall give the officer notice, at the time, of his intention to file suit for recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the officer designated by law for the collection of the tax for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the officer designated by law for the collection of the tax shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the officer designated by law for the collection of said tax to the date of refund.

(b) This Section shall afford a legal remedy and right of action in any State or federal court having jurisdiction of the parties and subject-matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Act, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such actions, service of process upon the officer designated by law for the collection of the said tax shall be sufficient

service, and he shall be the sole necessary, and proper party defendant in any such suit.

(c) This Section shall be construed to provide a legal remedy in the State or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States; provided, that upon request of a person and upon proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, the said person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the officer designated by law for the collection of the said tax until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

Section 3. This Act shall not be held to repeal any law providing that taxpayers shall have the right of testing the correctness of their assessments before the courts of the State, except insofar as such laws or parts of laws may be in conflict with this Act; nor shall this Act be held to repeal or affect any right under Act 16 of the Second Extraordinary Session of 1934, nor Act 23 of the Second Extraordinary Session of 1935.

Approved by the Governor: July 6, 1938.

A true Copy:
E. A. CONWAY,
Secretary of State.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 949

GREAT LAKES DREDGE & DOCK COMPANY, ET AL.,

Petitioners,

versus

PHILIP J. CHARLET, ADMINISTRATOR, DIVISION OF EMPLOYMENT SECURITY, LOUISIANA DEPARTMENT OF LABOR, (C. C. HUFFMAN, Administrator, etc., substituted in the place and stead of Philip J. Charlet).

ORIGINAL BRIEF ON BEHALF OF PETITIONERS

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Of Counsel.

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MISCELLANEOUS

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ORIGINAL BRIEF ON BEHALF OF PETITIONERS

May It Please The Court:

STATEMENT OF THE CASE

This is a declaratory judgment proceeding to determine the validity of the Louisiana Unemployment Compensation Act, as amended,[1] in its application to petitioners'

[1]Act 97 of 1936, as amended by Act 164 of 1938 and Acts 10 and 11 of 1940. The provisions of these acts relied on herein (unless otherwise specified) are reproduced in appendices to the petition for *certiorari* heretofore filed herein.

maritime employment. The validity of the act is challenged under Article 3, Section 2, and Article 1, Section 8, Clause 18, of the Federal Constitution, and on the ground that Congress has already preempted the field of regulation of maritime employment. The Circuit Court of Appeals affirmed (R. 55) the judgment of the district court (R. 27), holding the act constitutional as applied to such employment, and this Court has granted *certiorari*.

Petitioners are engaged from time to time in the operation and navigation, on the navigable waters of the United States within the State of Louisiana, of dredges and appurtenant vessels documented under the laws of the United States and licensed to engage in the coasting trade. In the course of these operations petitioners must have officers and crews in employment to operate and navigate their vessels. It is this employment which the State of Louisiana claims the power to regulate and tax under its Unemployment Compensation Act.

Under the provisions of the act, employers are required to comply with the regulations prescribed therein and to pay contributions equal to a certain percentage of wages payable on covered employments.[2] As originally enacted,[3] the act provided that the term "employment," as used therein, did not include "services performed as an officer or member of the crew of a vessel on the nevigable waters of the United States." It was amended in 1938[4] to provide that the term "employment" includes:

> "Services performed as an officer of member of a crew of a vessel on the navigable waters of

[2]Act 164 of 1938, Section 6, 10.
[3]Act 97 of 1936, Section 18 (g) (7).
[4]Act 164 of 1938, Section 18 (g) (6) (C).

the United States *customarily operating between ports in this state and ports outside this state.*"

While petitioners' vessels operate outside the State of Louisiana, in various states and territories of the United States, and in foreign countries, they do not customarily operate between ports in Louisiana and ports outside of Louisiana. Accordingly, the officers and members of the crews of petitioners' vessels are covered by the provisions of the statute.

DECLARATORY JUDGMENT PROCEEDING APPROPRIATE

The Court has requested counsel to discuss "whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute." A similar question was posed by the Court in *Nashville C. & St. L. Ry. v. Wallace*,[5] which arose prior to the adoption of the Federal Declaratory Judgment Act.[6] There the Court affirmed a declaratory judgment rendered by the Tennessee Supreme Court, holding constitutional a state gasoline tax as applied to the complainant. In the course of its opinion, the Court fully discussed the declaratory judgment procedure in relation to federal judicial authority, and, finding that "the judiciary clause of the Constitution . . . did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts,"[7] fully upheld the declaratory judgment proce-

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[5]288 U. S. 249 at p. 259 (1933).
[6]28 U. S. C. 400.
[7]*Op. cit. supra* note 5, at p. 264.

dure as a proper framework within which to exercise the federal judicial power. The same decision was rendered in a proceeding under the Federal Declaratory Judgment Act.[8]

Since the adoption of the federal act, many proceedings against state and federal officers seeking declarations of constitutionality, both of state[9] and of federal[10] statutes, and of the validity of state taxes,[11] have been decided both by this Court,[12] and by inferior federal courts,[13] where the essentials of a justiciable controversy were presented to the Court.[14] Indeed, the Committee Reports indicate that the Congress expected litigation respecting the constitutionality

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[8]Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937) at p. 240.

[9]See Wright v. Central Ky. Nat. Gas. Co., 297 U. S. 537 (1936); Curry v. McCanless, 307 U. S. 357 (1939); Southern Pacific Co. v. Conway, 115 F. (2d) 746 (CCA 9-1940); Johnson, et al v. Deerfield, 25 F. Supp. 913 (D. Mass.-1939); Montajano v. Rayner, 33 F. Supp. 435 (D. Idaho-1939); Public Cleaners, Inc. v. Florida Dry Cleaning & Laundry Board, 32 F. Supp. 31 (S. D. Fla.-1940); Starr v. Schram, 24 F. Supp. 886 (E. D. Mich.-1938); State of Texas v. Anderson, Clayton & Co., 92 F. (2d) 104 (CCA 5-1937); U. S. v. Standard Oil Co., 21 F. Supp. 645 (S. C. Cal.-1937).

[10]Currin v. Wallace, 306 U. S. 1 (1939); Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936); Bowie v. Gonzales, 117 F. (2d) 11 (CCA 1-1941); Feagate Co. v. Kirkland, 19 F. Supp. 152 (S. D. Fla.-1937); Fresno County v. Commodity Credit Corp., 112 F. (2d) 639 (CCA 9-1940); John A. Gebelein, Inc. v. Melbourne, 12 F. Supp. 105 (D. Md.-1935); Group Health Assn. v. Moor, 24 F. Supp. 445 (D. C. Dist. Co., 1938); Penn v. Glenn, 10 F. Supp. 483 (W. D. Ky.-1935); Roloff v. Perdue, 31 F. Supp. 739 (N. D. Iowa-1939); Wallace v. Hudson-Duncan & Co., 98 F. (d) 985 (CCA 9-1938).

[11]Texas v. Florida, 306 U. S. 398 (1939); Colorado Nat. Bank of Denver v. Bedford, 310 U. S. 41 (1940); see also Allen v. Regents of University System of Georgia, 304 U. S. 439 (1938). Commodity Credit Corp. v. County of Okla., 36 F. Supp. 694 (W. D. Okla.-1941); Consolidation Coal Co. v. Martin, 113 F. (2d) 813 (CCA 6-1940); Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (CCA 5-1936); Sancho v. Humacao Shipping Corp., 108 F. (2d) 157 (CCA 1-1939); Thompson v. State of La., 98 F. (2d) 108 (CCA 8-1938); U. S. v. Query, 37 F. Supp. 972 (E. D. S. Car.-1941).

[12]See cases cited, notes 9, 10, 11, *supra*.

[13]See cases cited *supra*, notes 9, 10, 11, and those collected in Borchard, Declaratory Judgments (2d ed., 1941) Chapter X, pp. 764, *et seq.*

[14]*Cf.* Electric Bond & Share Co. v. Securities & Exchange Commission, 303 U. S. 419 (1938); U. S. v. West Virginia, 295 U. S. 463 (1935); Ashwander v. Tennessee Valley Authority, *op. cit. supra*, note 10.

of legislation to be one of the uses to which the declaratory judgment procedure would be put.[15]

The instant case presents all of the requirements of a justiciable controversy appropriately cognizable in a declaratory judgment proceeding. The record shows that while petitioners deny that the state act can constitutionally be applied to their maritime employment, respondent "intends to and has always intended to, enforce each and every provision of the same, as he is charged by law to do; that he has no discretion in the enforcement of said statute and has no authority to waive any of its provisions . . ."[16] Thus there is here present "a case of actual controversy," not involving federal taxes,[17] between adversary parties, seeking a judicial determination of their legal rights of a kind traditionally cognizable in the federal courts.[18]

The device of a suit against a state officer to test the constitutionality of a state statute is perhaps the most char-

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[15]See Report of the House Committee on the Judiciary, 73d Cong., 2d Sess., Rept. #1264: "The declaratory judgment is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost any determinative fact or law. The declaration of a status was perhaps the earliest exercise of this procedure, such as the legality of marriage, the construction of written instruments, and the *validity of statutes.*" (Italics ours.)

[16]Answer, Article XI, (R. 15).

[17]Authority to declare with respect to federal taxes has specifically been withdrawn from the federal courts by an amendment to the Judicial Code under the Revenue Act of 1935. *Ibid*, note 6. The very fact that such authority was withdrawn only with respect to federal taxes indicates that the authority to make declarations with respect to the validity of state taxes was left unimpaired.

[18]See Nashville, C. & St. L. Ry. v. Wallace, *loc. cit. supra*, note 5, particularly at pp. 261-265; Aetna Life Ins. Co. v. Haworth, *op. cit. supra*, note 8, at pp. 243-244. It seems clear that a threat of immediate, irreparable injury is not necessary to invoke the declaratory procedure. Aetna Life Ins. Co. v. Haworth, *id.*, at p. 241; Currin v. Wallace, *op. cit. supra*, note 10, at p. 9. ". . . when a threat is made or an intention expressed by such an officer to enforce a law alleged to be unconstitutional he may be sued as an individual for a judgment declaring the act to be unconstitutional in a federal court." Sou. Pac. Co. v. Conway, 115 F. Supp. 746 (CCA 9-1940) at p. 749.

acteristic feature of American constitutional law,[19] and, indeed, seems specifically to have been contemplated by the Congress in the adoption of the Declaratory Judgments Act.[20] Declaratory judgments have been used fruitfully in other federal governments (notably Canada and Australia) judicially to delimit the respective powers of State and Nation.[21]

Contrary to the weight of authority, which recognizes the propriety of declaratory relief where the validity of a state tax is brought in question,[22] one federal district court has interpreted the Johnson Act[23] as restricting the use of the federal declaratory judgment procedure in state tax cases to instances in which an injunction could be granted.[24] This decision has not been followed,[25] and seems wrong in principle.

The Johnson Act by its very terms restricts the power of the federal courts only with respect to *injunctions* against the collection of state taxes,[26] and the Committee Reports on the bill make it plain that its only purpose was to prevent federal courts from interfering with the orderly collection of state taxes.[27] The companion statute prohibiting injunctions interfering with the collection of federal

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[19]See Osborn v. Bank of the United States, 9 Wheat. 738 (1824); Ex parte Young, 209 U. S. 123 (1907); Poindexter v. Greenhow, 114 U. S. 270 (1885); Sou. Pac. Co. v. Conway, *supra*, note 18.

[20]*Ibid.*, note 15.

[21]See cases collected in Borchard, *Declaratory Judgments* (2d. ed., 1941) p. 773; Annotation, 114 A. L. R., p. 1361, *et seq.*

[22]See Annotation, 132 A. L. R. 1130.

[23]28 U. S. C. A. Sec., 41 (1).

[24]See Collier Advertising Service v. City of New York, 32 F. Supp. 870 (1940).

[25]*Contra.*, Morrison-Knudsen Co. v. Board of Equalization, 35 F. Supp. 553 (1940).

[26]*Ibid.*, note 23.

[27]See Reports on S. 1515, 75th Cong., 2d Sess.; Senate, No. 1035, Calendar No. 1074; House No. 1508.

taxes[28] was interpreted not to apply to declaratory judgments with respect to the validity of federal taxes.[29]

Moreover, the mere pendency of a federal declaratory judgment proceeding can in no way interfere with the collection of state taxes. No state officer is enjoined, and such officer may, and indeed, if he deems it necessary for the protection of the interests of the state, should proceed in a state court to assess liens and collect the taxes in the ordinary course, notwithstanding the pendency of a federal declaratory judgment proceeding.[30] Hence, such proceeding is in no manner within the meaning, spirit, or intendment of the Johnson Act, and, as pointed out in the *Morrison-Knudsen* case,[31] such a construction of the Act is unacceptable.

Moreover, the Johnson Act is restricted to state tax litigation. The present suit concerns the validity of state regulation of maritime employment, of which the tax is but a part. The mere fact that a tax is collaterally involved cannot affect the authority of the court to render a declara-

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[28]26 U. S. C. A. (I. R. C.) Sec. 3653; 53 Stat. 446.

[29]See Penn v. Glenn, 10 F. Supp. 483 (1935); Vogt & Sons v. Rothensies, 11 F. Supp. 225 (1935).

[30]See Carpenter v. Edmonson, 92 F. (2d) 895 (CCA 5-1937); Toucey v. New York Life Ins. Co., 314 U. S. 118 (1941); 28 U. S. C. A. § 379.

[31]*Ibid.*, note 25. The court there said: ". . . When the amendment of 1935 to the Declaratory Judgment Act became a law the history in the courts was before the Congress that the Act had been invoked in State taxing statutes and yet Congress saw fit to include a prohibition with respect to Federal taxes only. Again, in 1937, with the same history before the Congress in connection with the amendment to the general jurisdiction of the district courts over State taxing matters, it evidently saw no reason to include any prohibition against the use of the Declaratory Judgment Act, but limited the jurisdiction by injunction of those courts to cases in which there was no plain, speedy and efficient remedy at law or in equity in the State courts. As it appears to me, these two incidents make it plain that the Congress did not desire or intend to change or limit the jurisdiction of the Federal courts under the Declaratory Judgment Act in regard to State taxing statutes or the law in the one place or the other would have been so written."

tory judgment as to the constitutionality of state regulations of maritime employment.

Finally, the Johnson Act restricts the authority of the Court only where "a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."[32] In the instant case petitioners are afforded absolutely no remedy under the circumstances of this case by the state law. Louisiana prohibits the use of the injunction in tax matters;[33] permits no relief by declaratory judgments; nor has it established a general administrative procedure for tax cases. The provision of Section 13 of the Louisiana Unemployment Compensation Act,[34] providing for "refunds and adjustments" of taxes paid, obviously are not applicable to a claim that the tax has unconstitutionally been imposed;[35] nor does it afford a remedy "at law or in equity."

The only remedy provided by Louisiana law for relief from unauthorized taxes is payment under protest followed by suit for recovery, where the taxpayer is "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto."[36] Here, however, the Administrator, while insisting that he intends to enforce the tax against petitioners,[37] has nonetheless refrained from assessing any tax against them, or from instituting any proceedings to enforce collection thereof, thus preventing petitioners from availing themselves of the only

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[32]28 U. S. A. 41 (1).

[33]*Op. cit. infra.*, note 36, Sec. 1.

[34]Louisiana Act 97 of 1936, as amended by Acts 164 of 1938, 10 and 11 of 1940, and 133 of 1942. See Appendix E herein, p. 64.

[35]See Grosjean v. American Press, 297 U. S. 233 (1936).

[36]La. Act 16, 2d Extra Sess. (1934), as amended by Act 24, 2d Extra Sess. 1935, and Act 330 of 1938.

[37]See *supra*, note 16.

remedy afforded by Louisiana law to test the validity of this tax as applied to them.

Hence, since the adoption in 1938 of the amendment to the Louisiana act here complained of, until date, petitioners have been faced with a contingent tax liability, with accumulating interest and penalties, to say nothing of possible criminal liability, without any opportunity of testing in a state court, the validity of the tax claimed from them. Obviously, even if the Johnson Act were applicable here, the "plain, speedy and efficient remedy . . . at law or in equity in the courts of such State," required by that act to deprive the federal courts of jurisdiction, is not present under the circumstances of this case.[38]

While the federal courts may exercise a discretion in assuming jurisdiction to declare constitutionality with respect to a state statute in cases dealing with local, rather than with federal law,[39] particularly when there is a pending state court proceeding,[40] no such situation is present here. Even if a discretion may be exercised in any case

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[38]Compare: Allen v. Regents of University System of Georgia, 304 U. S. 439, 449, 58 S. Ct. 980 (1937), particularly at p. 448, where, under similar harsh and uncertain circumstances, the Court both stretched equity jurisdiction to the breaking point, and held R. S. 3224 inapplicable, to permit the Regents to determine their tax liability. The Court said: "We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment."

[39]City of Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942); Railroad Commission v. Pullman Co., 312 U. S. 496 (1941); Beal v. Mo. Pac. R. Co., 312 U. S. 45 (1941).

[40]See Brillhart v Excess Ins. Co., 316 U. S. 491 (1942), at pp. 495, 481: ". . . It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceedin' pending in the Missouri state court. . . . The cause should be remanded to the District Court in order that it may properly exercise its discretion in passing upon the petitioner's motion to dismiss this suit."

the unusual facts of the instant case, as set out above, make the assumption of jurisdiction here appropriate.

No question of the reasonableness or unreasonableness of a state regulation involving an application of the purpose and operation of the statute in its fact milieu is here involved. Contrary to the situations in the *Fieldcrest Dairies* and similar cases[41] the issue presented here is purely and solely a federal question, involving no question of local law, and requiring a decision entirely under the federal Constitution. The action is appropriately brought under the Federal Declaratory Judgment Act.

CHARACTER OF EMPLOYMENT

The stipulation[42] describes in detail the various types of dredges and their appurtenant complementary craft involved in this litigation, and the functions of the various employees. The vessels are engaged in improving navigable channels and waters and creating fill. Some of the vessels are self-propelled, and others have the ability to move them-

[41]See Railroad Commission v. Pullman Co., *op. cit. supra*, note 39, at pp. 499-500: ". . . The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court . . ."; Chicago v. Fieldcrest Dairies, *op. cit. supra*, note 39, at pp. 171-172: ". . . Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois. Here as in the Pullman case 'a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.' . . ."; Beal v. Mo. Pac. R. R. Corp., *op. cit. supra*, note 39.

[42]The facts are admitted in the answer or stipulated (R. 17 seq., 29, 56-57).

selves by manipulating swinging wires in coordination with swinging anchors and spuds. In this way, a dredge may move forward as much as 2000 feet per day, from time to time describing an arc of some 400 feet, and if dredging in a river-boundary or in coastal waters, may constantly cross and re-cross state lines. They also operate from side to side of such rivers and from place to place in such coastal waters, and in so doing operate in and out of the state from time to time.

The dredges and other vessels involved are subject to all maritime laws and liabilities, and are amenable to all navigation rules applicable to other vessels. The Pilot Rules of the Department of Commerce, prescribed pursuant to Acts of Congress, "relating to the navigation of vessels," are applicable generally and by specific mention, to dredges both while "held in stationary position by moorings or spuds," and while "under way." All of the dredges and other vessels are documented by being enrolled and licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce;[43] and some hold classification certificates of seaworthiness issued by the American Bureau of Shipping.

The personnel of a dredge consists of the following complement of officers and crew: The master; first officer; purser; four mates; twelve or more deck hands; a chief engineer; three assistant engineers; fourth assistant engineer; three or more engine room oilers; one to three deck

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[43]The Certificate of Enrollment and License is in statutory form (R. S. 4321, 46 U. S. C. A. 263), and provides that "License is hereby granted for the said vessel to be employed in the coasting trade," and "that this license shall not be used for any other vessel, or for any other employment than is herein specified." When engaged in foreign trade, the documentation is changed to registration for that trade. See: In re Benglase Sand & Gravel Co., 76 F. 2d (CCA 7-1935) 593, 595.

oilers; three or more firemen; four levermen; a machinist and one or more helpers; a welder and one or more helpers; a ship's carpenter and helper; an electrician and helper; a chief steward, two or more cooks; three or more messboys; one or more cabin boys and one or more motorboat operators; four or more tug captains; and four or more tug mates or engineers. As expressly stipulated, the employees involved are "employed in the navigation and operation" of petitioners' vessels (R. 17).

Many of the officers aboard the dredges, while not always under strict requirements in that regard, hold federal licenses. By training and experience, and the nature of the work and services rendered, the officers and crew of a dredge are required to meet the same physical, mental and disciplinary standards, and to perform functions similar to those required of any other seamen. They are afforded the facilities of the U. S. Marine Hospitals, the same as any other seamen. (R. 24).

When the dredges are on voyages from one scene of operations to another, whether within the state, to another state, or to a foreign country, each vessel transports her officers and crew, her machinery, equipment, fuel and supplies. (R. 18).

Under the essentially similar companion measure to the Louisiana Unemployment Compensation statute, that is, the Federal Social Security Act, the Treasury Department, through the Bureau of Internal Revenue, has ruled, both generally, and specifically with regard to some of the plaintiffs herein, and to some of the dredges here involved, that the dredges are "vessels," and the persons employed there-

on are "officers or members of the crew" within the meaning of Title VIII of the Social Security Act.

The Bureau of Internal Revenue has ruled unequivocally that:[44]

> "Where the dredges . . . are operated 'on the navigable waters of the United States,' the services performed by the officers and members of the crew come within the excepting provisions of Section 907(c)(3) *supra*."

The Regulations further provide:[45]

> "The expression 'officers and members of the crew' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The exception extends, for example, to services rendered by the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, deck hands, porters and chambermaids, and by seal hunters and fishermen on sealing and fishing vessels."

The Bureau has ruled specifically, in a letter dated January 8, 1937, addressed directly to one of the plaintiffs herein, with reference to employment aboard a number of dredges here involved, that such employees were "officers and members of the crew" of the vessels.[46] Indeed, where an assessment was actually made against one of the plain-

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[44]See: Internal Revenue Bulletin XVI-4-8504, S. S. T. 78 (January 25, 1937).
[45]Regulation 91, Art. X, pp. 7-8.
[46]See letter Appendix A.

tiffs for federal unemployment compensation taxes for employees aboard a number of the dredges herein involved, the Bureau of Internal Revenue abated the tax claim, and rescinded the assessment.[47]

Although the federal act was amended after the issuance of the above regulations, no attempt was made to set them aside. There has therefore been a legislative recognition and approval of these regulations.[48]

The District Court (R. 34) and the Circuit Court of Appeals (R. 57) assumed without deciding that the persons employed aboard petitioners' vessels are officers and members of the crew of vessels on the navigable waters of the United States and within admiralty jurisdiction. It seems quite clear that both courts were correct in making this assumption.[49]

THE REGULATORY NATURE OF THE LOUISIANA ACT

A fundamental purpose of unemployment compensation legislation, both state and federal, is so to regulate

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[47]See Appendix B.

[48]McCaughn v. Hershey Chocolate Co., 283 U. S. 488 (1931); McGoldrick v. Gulf Oil Corporation, 309 U. S. 414 (1940).

[49]Ellis v. United States, 206 U. S. 246 (1906); Kibadeaux v. Standard Dredging Co., 81 F. 2d (CCA 5-1936), cert. den. 299, U. S. 549 (1937); Saylor v. Taylor, 77 Fed. 476 (CCA 4-1896); Gayle v. Union Bag & Paper Corp., 116 F. 2d 27 (CCA 5-1940), cert. den. 313, U. S. 559 (1941); Woods Bros. Const. Co. v. Iowa U. Compensation Com'n., 229 Ia. 1171, 296 N. W. 345 (1941). In *Southern Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251 (1940), the workman involved was occasionally employed on a lighter supplying coal to a vessel. "His employment was somewhat akin to temporary employment." The admissions in the stipulation herein clearly show that the employment herein is in no way similar to that in the *Basset* case. Cf. *infra*, note 112. Moreover, in the *Bassett* case, the Court was concerned with the meaning of words used in congressional legislation. (33 U. S. C. A. 901, and supp.). In any event, the employment was within the admiralty and maritime jurisdiction of the United States.

employment as to reduce unemployment. We have this on the authority both of the Social Security Board and of the President of the United States, who, in his first Message transmitting the Social Security Bill to Congress, in January of 1935, declared:

> "An unemployment Compensation System should be constructed in such a way as to afford every practicable aid and incentive toward the *larger purpose of employment stabilization.*" (Emphasis supplied.)

In the booklet published by the Social Security Board, so heavily relied on as authority by defendant, called "*Unemployment Compensation, What and Why,*" the following is given as the fundamental theory of unemployment compensation laws in the United States:

> "Based on the theory that the employer was responsible for unemployment, it assessed the entire cost on him on the assumption that if he bore the cost of the system, he would make every effort *to stabilize employment* and thereby prevent unemployment."[50] (Emphasis supplied.)

Again, the authority above referred to comments on the underlying principle of unemployment compensation as follows:[51]

> "The advocates of the employer reserve type of plan, in placing their emphasis on the stabilization of employment, feel that, since the em-

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[50] *Unemployment Compensation, What and Why,* Social Security Board (1937), p. 22. This discussion is with reference to the Wisconsin Act, the prototype of American Unemployment Compensation legislation.

[51] *Ibid.,* at pp. 40-41.

ployer is, to a considerable extent, responsible for the unemployment of his plant, he will do everything in his power *to prevent that unemployment* if he has to pay for it." (Emphasis supplied.)

And finally, the Social Security Board says:[52]

> "*Unemployment compensation must be regarded as only one aspect of the approach to the solution of the unemployment problem . . . The problem is, of course, broader than that of providing unemployment compensation*, comprehending as it does the inherent factors in our industrial system which cause unemployment, as well as the alleviation of distress which goes beyond the limits of unemployment compensation." (Emphasis supplied.)

With these official pronouncements of the basic theory and philosophy of state unemployment compensation plans, it is now possible to turn to the Louisiana statute to investigate the extent to which, and the manner in which, it regulates employment (and specifically maritime employment) in seeking to prevent unemployment; and how the unemployment compensation tax fits into this structure.

The act has for its purpose, avowed in its Declaration of Policy: "encouraging employers to provide more stable employment." One of the forms which such "encouragement" takes in the act,[53] is tax penalties and tax reductions

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[52] *Ibid.*, at p. 51.

[53] While the present Louisiana unemployment compensation statute (Act 11 of 1940) does not contain a merit system feature, the prior statute, which applies to a portion of the period involved in this litigation, does contain such system, and shows clearly the manner in which the unemployment compensation tax is to continue to operate as an additional sanction for the regulation of employment in Louisiana. Indeed, the present statute contains the following provision: (La. Act

to the employer. The statute contemplates payment by employers of "contributions" of a percentage of wages paid by them with respect to employment according to a rising scale reaching ultimately 2.7 per cent of the payroll.[54] The employers' "contribution" rate then becomes based on "benefit experience," determined in the following manner.[55] The Commissioner is required to maintain a separate account for each employer, crediting his account with all the contributions paid in his own behalf, and charging his account with all amounts paid out as benefits.[56] The act then goes on to provide:[57]

> "The Commissioner shall . . . classify employers, industries, and/or occupations with respect to the unemployment hazard in each . . . He may apply such form of classification or rating system *which in his judgment is best calculated* to rate most equitably the employment risk of each employer or group of employers and to *encourage*

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11 of 1940, § 6 (c): "Study of Experience Rating. The Administrator shall investigate and study the operation of this Act and actual experience hereunder with a view to determining the feasibility of establishing a rating system which would equitably rate the unemployment risk and fix the contribution to the fund of each employer, and which would encourage the stabilization of employment. The Administrator shall submit his report and recommendations to the Governor and the Legislature." This provision clearly shows the State's intention of continuing to use the tax as an essential of the regulatory system, and that it is merely a matter of accumulating sufficient experience to place the regulation into operative effect. In the meantime, the very accumulation of the experience is tantamount to the application of the tax sanction envisioned by the Act, because the rate subsequently to be established by the legislature will reflect the "experience" of each employer or group of employers being compiled today. See: Report to Governor, Louisiana Unemployment Compensation Commission, "Experience Rating in Louisiana," April, 1942.

[54] Act 164 of 1938, Sec. 6(b) (3). This rate was reached by Dec. 31, 1937.

[55] *Ibid.*, Sec. 6(c). The act contemplates a waiting period, until July 1, 1941, before the "benefit experience" or "merit rating" plan goes into effect, in order to accumulate capital in the fund.

[56] *Ibid.*, Sec. 6 (c) (1).

[57] *Ibid.*, Sec. 6 (c) (3).

the stabilization of employment." (Emphasis supplied.)

On the basis of such classifications the Commissioner is authorized to "determine the contribution rate applicable to each employer,"[58] which may fluctuate, at the Commissioner's discretion, between 1 per cent and 3.6 per cent of total wages paid.[59] Hence, it is apparent that the whole purpose of the merit-rating-system is to regulate employment so as to reduce the number of separations from employment by penalizing the employer who discharges his employees, or whose employees quit, for any cause. When this regulatory statute is applied to maritime workers, it becomes a direct regulation of the contract of maritime employment, by penalizing the interruption of such employment.

Thus, a maritime employer who customarily releases the crew of his vessel during the period in which it is laid up, may find himself, by the application of the formula set out in the act, penalized to the extent of 2.6 per cent of his total payroll, should the benefits paid to his employees from the Unemployment Compensation Fund deplete his account with the Commission.

Moreover, there is a well-known practice in maritime employment—a custom sanctioned by federal statutes[60]—of "signing off" the vessel at the termination of a period of employment. According to maritime custom, maritime workers are not re-employed by the owners or master at the termination of their employment, and do not ordinarily immediately enter into a second employment aboard the

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[58] *Id.*
[59] *Ibid.*, Sec. 6 (c) (3) (ii).
[60] See 46 U. S. C. A. 596, 642.

same vessel, as would land-workers at the same plant. On the contrary, they customarily register at maritime hiring halls where they await their turn for re-employment, under a system of rotation.[61] Federal statutes recognize and facilitate this custom by requiring that seamen be given a prompt discharge accompanied by full settlement of their wages.[62] Yet the operation of the Louisiana act would force the abandonment of this long-established maritime employment custom, or penalize the employer for abiding by it, by increasing his rate of tax, because of the benefits that would inevitably be paid his employees, and charged against his account, while they were awaiting re-employment by rotation through the maritime hiring halls.

The tax aspect of the Louisiana statute is but one of its regulatory features of employment relationship. It also calls for a host of other regulations, of a most comprehensive character, entirely independent of the tax, and in no way connected with its collection or enforcement.[62a] For example, the act requires each employing unit to keep "true and accurate records, containing such information as the Commission may prescribe," which must be available to him or his representatives at all times for inspection and copying. Moreover, he, his representatives, or any members of the Board of Review, may require of the employer "any sworn or unsworn reports . . . necessary for the effective administration of this Act."[63] The Commissioner, or the Board of Review, or their representatives, all have "power to administer oaths . . . take depositions . . . issue

[61]For a full description of this system, see Testimony of Mr. George E. Bigge in Hearings on the Social Security Act before the House Committee on Ways and means, *op. cit. infra*, note 184.

[62]*Ibid.*, note 60.

[62a]The tax collection and enforcement provisions are elaborate, and are contained exclusively in Section 13 of the Act, reproduced in the appendix hereto, p. 64.

[63]Act 164 of 1938, Sec. 10 (g).

subpoenas to compel the attendance of witness and the production of books, papers, correspondence, memoranda, and other records . . . in connection with a disputed claim or the administration of this Act,"[64] and to force compliance by application to the courts to enforce the subpoena through their contempt power, or by criminal proceedings.[65]

These broad and comprehensive regulatory powers are conferred upon the Commissioner, not alone with respect to the collection of the unemployment compensation tax, but also in connection with the Commissioner's authority with regard to "employment stabilization," and his power in making and enforcing rules and regulations, and in determining eligibility.

With specific reference to "employment stabilization" the act has the following to say:[66]

> "The Commissioner with the advice and aid of advisory councils, and through the appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; . . . to promote the reemployment of unemployed workers throughout the State in every other way that may be feasible . . ."

With regard to the rule-making power of the Commissioner, the act gives him the authority to adopt, amend or rescind, all rules and regulations that he shall deem necessary or suitable to the end of administering the act.[67]

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[64] *Ibid.*, Sec. 10 (h).
[65] *Ibid.*, Sec. 10 (i), Sec. 15.
[66] Ibid., Sec. 10 (f).
[67] Ibid., Sec. 10 (a), (b).

Perhaps the most immediate every-day interference by the Commissioner with maritime employment relationship would occur in the determinations he must make of the eligibility of idle workers to receive unemployment compensation. These "determinations" directly affect the employer's tax rate, under the fluctuating scale, and thus operate as regulations of employment, because the Commissioner may find that the worker is ineligible for benefits,[68] in which case no withdrawals will be charged against the employer's account, or he may postpone as much as ten weeks, the eligibility date for payment of benefits,[69] thus substantially increasing the probability that the workers will gain employment and not cause withdrawals against the employer's account.[70]

Such determinations depend upon (1) whether or not the worker "left work voluntarily without good cause;"[71] (2) whether he was discharged for misconduct;[72] (3) the seriousness of the misconduct;[73] (4) whether available work is "suitable,"[74] (5) the "degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence;"[75] (6) whether the position offered is vacant due to a strike, lockout or labor dispute;[76] (7) whether the wages, hours or other conditions of the

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[68] *Ibid.*, Sec. 3(b). See Appendix C herein, p. 59.
[69] *Ibid.*, Sec. 4; particularly subsection (d). See Appendix D herein, p. 61.
[70] For a discussion of the "Waiting Period" requirement, see C. C. H., Unemployment Insurance Service, All-State Treatise, Paragraph 1955.
[71] Act 164 of 1938, Sec. 4(a). See Appendix D herein, p. 61.
[72] *Ibid.*, Sec. 4(b).
[73] *Id.*
[74] *Ibid.*, Sec. 4(c).
[75] *Ibid.*, Sec. 4(c)(1).
[76] *Ibid.*, Sec. 4(c)(2)(a).

work offered are substantially less favorable than those prevailing for similar work in the locality;[77] and (8) whether the particular employee is participating in or directly interested in a labor dispute.[78]

All of the above factors must be considered by the Commissioner in making a determination upon a claim for benefits, and he has at his command, and must utilize, all of the above described machinery for subpoenas, testimony, regulations of the books and accounts of the employer, and general supervision over employment practices. This calls for a most minute, comprehensive and all-inclusive regulation of the maritime employment relationship when the act is applied to maritime employment.

Moreover, because of the nature of the sanction applied in the form of increased taxes, and because of the "benefits" received by the employee, the employer-employee relationship is definitely affected and regulated by decisions of the Commissioner as to "whether or not the worker left work voluntarily without good cause"; or whether he has been discharged for misconduct, the seriousness of the misconduct, etc. Obviously, if the Commissioner takes the position that violations of certain principles established by the employer are not "misconduct" within the meaning of the act, or are so inconsequential as not to justify penalization by an increased waiting period, then the employer must either discontinue such practices or suffer the tax sanction penalty.[79]

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[77] *Ibid.*, Sec. 4 (c) (2) (b).

[78] *Ibid.*, Sec. 4 (c) (2) (d) (i).

[79] As to the regulatory nature and effect of such disqualifications, and the broad discretion of the Commissioner thereunder, see, generally, C. C. H. Unemployment Insurance Service, All-State Treatise, Paragraph 1963, *seq.*, particularly Paragraph 1970, as to misconduct.

Discipline aboard ship is a very different thing from discipline on land, and misconduct and insubordination on a vessel are infinitely more significant and more hazardous than on land. Federal statutes have been painstaking in defining and in penalizing innumerable types of misconduct,[80] including insubordination,[81] drunkenness and neglect of duty,[82] carrying sheath knives,[83] quitting without leave,[84] etc. As said very recently by this Court in the *Southern Steamship Company* case:[85]

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land . . . Every one and every thing depends on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized."

It is submitted that the Louisiana act regulates and interfered with petitioners' maritime employment.

STATE CANNOT REGULATE OR TAX ESSENTIAL INCIDENTS OF EXERCISE OF FEDERAL FRANCHISE

As above pointed out, the vessels involved in this litigation are documented, having been enrolled and licensed by the Federal Government to engage in the coasting trade. These licenses cover operations not only on the coastal wa-

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[80] 46 U. S. C. A. 701, *seq.*
[81] 46 U. S. C. A. 703.
[82] *Ibid.*, 704.
[83] *Ibid.*, 710.
[84] *Ibid.*, 701, Second.
[85] Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31 (1942) at p. 38. Also see Aguilar v. Standard Oil Co. of New Jersey, Nos. 454, [illegible], October Term, 1942.

ters, but on rivers.[86] Vessels enrolled and licensed in pursuance of the act of Congress have conferred upon them as full and complete authority to carry on the coasting trade as it is within the power of Congress to confer.[87]

The Louisiana act attempts to interfere with these licenses and to impose additional burdens on the exercise thereof. If the state has power to impose the regulations and tax called for by the act, it equally is authorized to use force to effect compliance therewith, thereby preventing the exercise of these federal licenses.

This Court has set aside state statutes making more burdensome the exercise of a franchise, privilege or right derived from the federal Constitution.[88]

With specific reference to the exercise of a federal license to engage in the coasting trade, this Court said, in *Moran v. City of New Orleans*:[89]

> "The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to burden with an exaction, fixed at its own

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[86]Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. Ed. 23 (1824); Ravenies v. United States, 37 Fed. (C. C. Ala. 1899) 447.

[87]Sinnot v. Davenport, 22 How. 227, 239-240, citing Gibbons v. Ogden, 9 Wheat. pp. 210-214.

[88]See California v. Cent. Pac. R. Co., 127 U. S. 1 (1888); Western Union Telegraph Co. v. Wright, 185 Fed. 250 (C. C. A. 5th, 1910); Same v. Same, 185 Fed. 260 (C. C. A. 5th, 1910)). See also Cent. Pac. R. Co. v. California, 162 U. S. 91 (1896); Williams v. Talladega, 226 U. S. 404 (1912); Western Union Telegraph Co. v. Weaver, 5 Fed. Supp. 493 (D. C. Neb. 1932); M'Culloch v. Maryland, 17 U. S. 316 (1819); Osborn v. Bank of United States, 22 U. S. 738 (1824); The Farmers' and Mechanics' Nat. Bank v. Dearing, 91 U. S. 29 (1875); LeLoup v. Mobile, 127 U. S. 640 (1888); Western Union Telegraph Co. v. Weaver, 5 Fed Supp. 493 (D. C. Neb., 1932).

[89]112 U. S. 69 (1884). See also Frere v. Von Schoeber, 47 L. Ann. 324, 16 So. 808, 27 L. R. A. 414 (1894); New Orleans & Memphis Packet Co. v. James, 32 Fed. 31 (C. C. La., 1887).

> pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the constitution and laws of the United States."

In *Hall v. De Cuir*,[90] this Court had already held:

> "Throughout our history, the Acts of Congress have regulated the enrollment and license of vessels to be engaged in the coasting trade, and this court expressly determined that a state law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void."

In *Harmon v. City of Chicago*,[91] the identical point was again under consideration, and this Court again held that no excise tax of any kind may be levied in connection with the operation of vessels licensed by the Federal Government to engage in the coasting trade.

The mere fact that the state tax is general in its application, non-discriminatory, and taxes employment in all businesses, regardless of its nature, does not render the imposition valid when sought to be applied to a federally licensed business. Much the same argument was made by the state, and rejected, in *Brown v. Maryland*,[92] where this Court, finding that a general state occupational license tax conflicted with the right acquired by an importer on payment of duty to sell his goods at wholesale, said:[93]

> ". . . it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing

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[90]95 U. S. 485, 506 (1878). See also: Western Union Tel. Co. v. James, 162 U. S. 650.

[91]147 U. S. 396 (1893). See also: Sinnot v. Davenport, 22 How. (63 U. S.) 227 (1859); Foster v. Davenport, 22 How. (63 U. S.) 244 (1859); Wheeling P. & C. Transp. Co. v. City of Wheeling, 99 U. S. 283 (1879).

[92]12 Wheat, 419 (1827).

[93]*Ibid.*, at p. 444.

> more. It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. . . . It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. . . . This the state has not the right to do, because it is prohibited by the constitution."

The significant fact is whether the tax "obstructs the free course of a power given to Congress";[94] and considered in that view, it is immaterial whether the tax "works material prejudice to the characteristic features of the general maritime law."[95] Certainly the taxes in the *Moran* and *Harmon* cases, *supra*, had no such effect; nor did the general capital stock tax levied by Pennsylvania and sought unsuccessfully to be applied to a ferry company in *Gloucester Ferry Co. v. Pennsylvania*[96]—yet all were held to be unconstitutional as burdening the exercise of a franchise or right derived from the federal government.

The regulations and tax under the Louisiana act are "with respect to having individuals in his employ,"[97] and

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[94] *Ibid.*, at p. 448.

[95] Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 (1937); Motor Transit Co. et al. v. Railroad Comm'n. of California, 15 F. Supp. (DC Cal. 1936) 630; Di Santo v. Commonwealth of Pennsylvania, 273 U. S. 34 (1927); Texas Transport & Terminal Co. v. City of New Orleans, 264 U. S. 150 (1924); Clyde SS Co. v. City Council of Charleston, 76 Fed. (CC S C 1896) 46; Crutcher v. Commonwealth of Kentucky, 141 U. S. 47 (1891); Philadelphia & S. M. SS Co. v. Commonwealth of Pennsylvania, 122 U. S. 326 (1887).

[96] 114 U. S. 196 (1885).

[97] Social Security Act, 42 U. S. C. A. 1101. The Louisiana Act says: "with respect to employment." Act 164 of 1938, Sec. 6. See also: Steward Machine Co. v. Davis, 301 U. S. 548 (1937) at p. 574; Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937) at p. 508; Helvering v. Davis, 301 U. S. 619 (1936) at p. 645.

when applied to petitioners' maritime employment, they become a burden and an excise on the privilege of having the officers and crews of plaintiffs' federally enrolled and licensed vessels navigate them on the navigable waters of the United States. All the hair-splitting possible cannot make it otherwise.

If the Louisiana act had imposed a license tax upon petitioners, measured by the wages paid petitioners' maritime employees, it would seem quite clear that the tax would be invalid on the ground that it was an interference with the exercise of petitioners' licenses to engage in the coasting trade. Although the present statute is not drawn exactly along the lines suggested in the foregoing example, the result is actually the same in either case. Petitioners cannot exercise their federal licenses without payment of the tax under the present statute any more than they could without payment of the tax under the suggested statute.

Certainly in licensing these vessels the federal government did not contemplate that they would operate without officers and crews, or that the ability properly to man the vessels should be subject to state regulation and taxation. It would seem that the federal license to engage in the coasting trade includes the privilege of employing the necessary officers and crews to man the licensed vessels without state interference or taxation, as surely as did the same sort of license in *Gibbons v. Ogden, supra,* include the privilege of navigating the Hudson River, and the license in *Hall v. DeCuir, supra,* include the privilege of navigating the Mississippi River, without interference by the State. The having of officers and crews in employ to man vessels is an incident indispensable to the enjoyment of the license granted by the federal government, and as such, it

is not subject to interference by state regulation or by taxation.

This principle is established by the long line of cases holding invalid state taxes imposed on instrumentalities essential to the conduct of an activity beyond the taxing authority of the state. *Cooney vs. Mountain States Telephone & Telegraph Co.*[98] is a recent illustration of this principle. While this series of case deals with state burdens, by taxation, on essential instrumentalities of interstate commerce, the principle is equally applicable to state burdens on essential instrumentalities for the carrying on of maritime activities within the admiralty jurisdiction of the United States; a field equally, if not exclusively, within the sphere of federal control. In the *Cooney* case, the state sought to tax, not the interstate activity of the corporation, but the essential means, the instrumentality, by which such activity was carried on, by levying an excise tax of from $1 to $3 on each of the telephone instruments used by the company in carrying on its business. This Court held that even though the telephone instruments were susceptible of use in intrastate as well as in interstate commerce, the tax was nevertheless void as necessarily burdening interstate commerce. The identical principle is applicable to the taxation attempted here of maritime employment.

As heretofore pointed out, the fact that a tax is nondiscriminatory in its nature, and applies to employment generally throughout the state, does not save it where, as

[98]294 U. S. 384 (1935). See also: State Freight Tax Case, 15 Wall. 232 (1873); Pickard v. Pullman Co., 117 U. S. 34 (1885); Robbins v. Shelby County, 120 U. S. 489 (1887); Philadelphia & So. M. S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887); LeLoup v. Port of Mobile, 127 U. S. 640 (1888); Crutcher v. Kentucky, 141 U. S. 47 (1891); Adams Express Co. v. New York, 232 U. S. 14 (1913); Bowman v. Continental Oil Co., 256 U. S. 642 (1920); Sprout v. Bend, Inc., 277 U. S. 163 (1927); New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 (1929).

here, the tax is imposed directly upon the thing essential to the conduct of the activity. In *Helson vs. Kentucky*,[99] a state act was held void, as applied to gasoline purchased out of the state, but used in Kentucky to operate an interstate ferry, which imposed a general tax of 3c a gallon on all gasoline used within the state, the Court saying:[100]

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? *A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce . . . it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is affected.*" (Emphasis supplied.)

The having of officers and crews in employment is just as essential to the exercise of petitioners' federal licenses in the instant case as was the consumption of fuel in the cited case to the exercise of the right to engage in interstate commerce. In each case there is a state burden on the exercise of a right, privilege or franchise derived from the Federal Constitution, and in neither case can such state burden be sustained.

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[99]279 U. S. 245 (1929). See also: Cases referred to in opinion.
[100]*Ibid.*, at p. 252.

CONGRESS ALONE MAY REGULATE AND TAX MARITIME EMPLOYMENT

A clear distinction has been and must be drawn between the powers of Congress under the Commerce clause of the Constitution on one hand, and under the Admiralty clause, on the other. With respect to commerce, the constitutional grant to Congress is a *regulative* power, restricted to its interstate aspects, plenary when exercised, but, except in matters of national concern, shared with the states in the absence of congressional legislation;[101] while the Admiralty Clause grants both to the judiciary,[102] and to Congress,[103] exclusive authority over "all cases of admiralty and maritime jurisdiction."[104] It is on the basis of these latter constitutional texts that the doctrine of uniformity of the maritime law of the nation early became a part of our law, as distinguished from the principles applicable to interstate commerce, which recognize a proper sphere for the operation of state regulations of a local character.

In *The Lottawanna*[105] this Court stated that "it certainly could not have been the intention to place the rules and limits of maritime law under the disposal of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed . . ." And in *Butler v. Boston & S. SS Co.*[106] this Court, speaking of the

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[101]See New York, N. H. & H. R. v. New York, 165 U. S. 628 (1899).
[102]U. S. Constitution, Art. III, Sec. 2.
[103]U. S. Constitution, Art. I, Sec. 8, Clause 18.
[104]See Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920), at p. 161: *"The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."* (Emphasis supplied).
[105]21 Wall. 558 (1874), at p. 575.
[106]130 U. S. 527 (1889), quoted from 9 S. Ct. at p. 619. See also The Roanoke, 189 U. S. 185 (1902), where the Court said at 23 S. Ct. p. 493; ". . . we have several times had occasion to hold that where Congress had dealt with a subject within its exclusive power, *or where such ex-*

respective powers of the national and state legislatures concerning maritime affairs, said that "the power of legislation on the . . . subject must necessarily be in the national legislature, and not in the state legislatures."

This doctrine of uniformity, and of the exclusiveness of congressional authority with respect to maritime affairs, has never been departed from,[107] when this Court has been called upon to consider state legislation regulative of, or burdening, maritime affairs.[108]

The reception into admiralty of local laws and customs not hostile to the characteristic features of maritime law[109] is entirely consistent with this doctrine of uniformity, and, indeed, is dictated by the implications of *Erie R. v. Tompkins*.[110] As observed by this Court recently in *Just v. Chambers*:[111]

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clusive power is given to the Federal courts, as in case of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the Federal Government." (Emphasis added).

[107]See Panama R. Co. v. Johnson, 264 U. S. 375 (1924), and cases collected therein at p. 387; Parker v. Motor Boat Sales, Inc., 314 U. S. 244 (1941) at p. 248, *seq.*

[108]In many instances state statutes regulating maritime affairs have been attacked in this Court only on the ground that such statutes violated the Commerce clause of the Constitution. In such cases the Court, applying the familiar rule of deciding only issues properly raised and presented (*Cf.* McGoldrick v. Compagnie Generale Transatlantique, 309 U. S. 430 (1940); O'Donnell v. Great Lakes Dredge & Dock Co., Oct. Term, 1940, No. 320, decided Feb. 1, 1943.), decided such cases purely upon the principles of interstate commerce, and without reference to the Admiralty Clause of the Constitution. Thus in Cooley v. Board of Wardens, 12 How. 299 (1851), the Court specifically said: "To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined." Other cases decided under the Commerce Clause include the ferry cases (Conway v. Taylor's Ex'r., 1 Black 603 (1862); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885); City of Sault Ste. Marie v. International Transit Co., 234 U. S. 333 (1914); Port Richmond & Bergen's Point Ferry Co. v. Board of Chosen Freeholders of Hudson County, 234 U. S. 317 (19143. Also see Kelly v. Washington, 302 U. S. 1 (1937).

[109]Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); The Lottawanna, 21 Wall. 558 (1874).

[110]304 U. S. 64 (1938).

[111]312 U. S. 383 (1941) at p. 390.

> "... the maritime law was not a complete and perfect system and ... in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration."

Every instance in which local law has been received into the Admiralty, however, has been with respect to the recognition of substantive rights of individuals, such as those concerning maritime torts,[112] liens,[113] survivorship,[114] and the like.[115] Uniformly, in the absence of a congressional invitation for state legislation,[116] where the state has attempted to impose regulations on maritime affairs, either

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[112]Western Fuel Co. v. Garcia, *supra*, note 3. The "local concern" doctrine in cases of torts occurring on navigable waters in no way affects the principle of uniformity. These cases simply hold, in effect, on the basis of the particular fact situations present, that the nature of the employment, being strictly local, rather than the mere fact that the injury happened to occur on navigable waters, is determinative of the type of relief afforded. See Davis v. Department of Labor & Industries, 63 S. Ct. 225 (1942). Hence, contrariwise, in the converse situation, where a maritime worker is injured ashore, he, as a mariner, may recover under the maritime law. See O'Donnell v. Great Lakes Dredge & Dock Co., Oct. Term, 1942, No. 320, decided Feb. 1, 1943; Aguilar v. Standard Oil Co., Oct. Term, 1942, No. 454, decided April 19, 1943; Waterman Steamship Corp. v. Jones, Oct. Term, 1942, No. 582, decided April 19, 1943.

[113]The Lottamanna, *supra*, note 105.

[114]Just v. Chambers, *supra*, note 111.

[115]See Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 (1924).

[116]Such an invitation was expressly given by Congress with respect to pilotage. See Act of August 7, 1789, 1 Stat. 54, 46 U. S. C. A. § 211; Cooley v. Board of Wardens, *op. cit. supra*, note 108. It is implied by immemorial custom with respect to state legislation both of ferriage (See Port Richmond & Bergen Point Ferry Co. v. Hudson County, 234 U. S. 317 (1914)), and of pilotage. In the Cooley case, the Court said: "... it may be observed, that similar laws have existed ... in the States since the adoption of the federal Constitution; that by the Act of the 7th of August, 1789, 1 Stat. at Large, 54, Congress declared that all pilots ... shall continue to be regulated in conformity with the existing laws of the States, etc., and that this contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importanace, is entitled to great weight, in determining whether such a law is repugnant to the Constitution ..." Moreover, the Court, in effect, found from the history of congressional legislation such an invitation for state legislation requiring the inspection of small, otherwise uninspected boats. Kelly v. Washington, 302 U. S. 1 (1937). *Contra*, Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920).

by tax,[117] or otherwise,[118] this Court has held such state action to be unconstitutional.[119] The doctrine has specifically been held to prohibit local regulation of maritime employment.[120]

In the quite similar[121] case of *Washington v. Dawson*,[122] where the only question involved was whether defendant stevedoring firm could "be compelled to contribute to the accident fund provided by the Workmen's Compensation Act of Washington"—that is, whether defendant's maritime employment was subjected to a forced state contribution for the privilege of employment within the state—this Court held the tax unconstitutional as violating the principle of uniformity required of things maritime. The

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[117]Moran v. New Orleans, 112 U. S. 69 (1884); Harmon v. Chicago, 147 U. S. 396 (1893); Washington v. Dawson, 264 U. S. 219 (1924).

[118]Gibbons v. Ogden, 9 Wheat. 1 (1824); Hall v. deCuir, 95 U. S. 485 (1878).

[119]Supra, notes 117 and 118.

[120]United Dredging Co. v. City of Los Angeles, 10 F. (2d) 239 (D. C. Calif., 1926), aff'd., 14 F. (2d) 864 (CCA 9-1926); *Cf.*, Parker v. Motor Boat Sales, Inc., 314 U. S. 244 (1941).

[121]The analogy between state unemployment compensation and state workmen's compensation acts in their philosophy, operation and effect, is immediate and direct. Both are products of machine age mass production methods, and are "social legislation" designed to shift onto industry a fair share of the cost to the individual of inevitable economic loss consequent on industrial operations, due either to accident or death, in the one case, or to cyclical unemployment in the other. Both schemes work on an "insurance" principle, and are financed by forced "contributions" of a percentage of the payroll, imposed by the state. Both are usually administered by state administrative agencies with broad regulatory powers over the employer. In both cases the employee is given rights, not so much against the employer who participates, but directly against the fund created to compensate the employee for his loss, either of life, limb, or of his job. In both cases, the proceeding to determine whether, or to what extent, the employee should share in the fund is carried on in an adversary manner with the employer, who, in both cases, is adversely affected by recoveries from the fund because of increased contribution rates he must pay on the insurance principle. In both cases, this results in an incentive to the employer to reduce or to eliminate the cause of the increase—in the one case, industrial accidents; in the other, unemployment. See 4 Fordham L. Rev. 485, 492. A similar analogy has been drawn between the Federal Employers' Liability Act and the Fair Labor Standards Act. See Overstreet v. North Shore Corp., 63 S. Ct. 494 (1943).

[122]264 U. S. 219 (1924).

application of this principle to the regulations and tax imposed on maritime employment by the Louisiana Unemployment Compensation Act requires a similar declaration of unconstitutionality in the instant case.

The cases cited by the Court below are not in point. *Cornell Steamboat Co. v. Sohmer*,[122] simply upheld a state corporation franchise tax applied against a corporation of its own creation engaged in navigation.[124] *Huse v. Glover*,[125] and *Sands v. Manistee River Impr. Co.*,[126] merely approved state authorized charges for the use of state constructed maritime facilities and improvements to navigation—situations not present here. In the *Old Dominion* case[127] the Court, on well-recognized principle, approved a state personal property tax assessed against vessels permanently located within the state.

But none of these cases approved the imposition, as is here present, of state regulations and taxes on a maritime relationship (i. e., the hiring of crews in employment) essential to the exercise of a maritime activity duly licensed by Congress.

While it is insisted that the principles[127a] developed by this Court for the solution of problems presented under the

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[122]235 U. S. 549 (1915).

[124]There the Court specifically pointed out: ". . . the tax . . . is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity . . . if the parties . . . are dissatisfied with the price exacted by the state for this privilege, they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the state within the state."

[125]119 U. S. 543 (1886).

[126]123 U. S. 288 (1887).

[127]Old Dominion S. S. Co. v. Virginia, 198 U. S. 299 (1905).

[127a]See Graves v. New York, 306 U. S. 466 (1939) at p. 479, footnote 1: "The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the

commerce clause of the Constitution are inapplicable to maritime affairs, yet even were such principles applied to the instant attempted state regulation and taxation of maritime employment, the result would be the same. The matter here is not one of "peculiarly local concern." The vessels involved in this case cross and recross state lines. They operate in various states, sometimes in foreign countries, and when working along water-boundaries, frequently cross and recross state lines in the course of their operations.

Navigation, particularly of registered and documented vessels, is peculiarly national in its character,[128] and hence, a field within which, under well-recognized principles, even "inaction[129] (by Congress) . . . is equivalent to a declaration that . . . (it) shall remain free and untrammeled."[130]

Moreover, this Court has specifically held that maritime employment is a matter of national concern with which state laws may not interfere.[131] In *Employers' Liability Assurance Corp. v. Cook*,[132] this Court held that "The unloading of a ship is not a matter of purely local concern, as we have often pointed out."

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commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority."

[128]See Butler v. Boston & S. S. S. Co., *op. cit. supra* note 106; Panama R. Co. v. Johnson, *op. cit. supra*, note 107.

[129]As will be developed in complete detail below (see *infra*, p. 36, *seq.* 41). Congress has actually acted in the instant situation in a way that precludes state interference.

[130]See Hall v. deCuir, 95 U. S. 485 (1878) at p. 490, quoting from Welton v. Missouri, 91 U. S. 282 (1876). Compare, Fisher's Blend Station, Inc. v. Tax Commission, 297 U. S. 650 (1936).

[131]See Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479 (1923); Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171 (1924); Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449 (1925); Messel v. Foundation Co., 274 U. S. 427 (1927). Compare, Aguilar v. Standard Oil Co. 85, Nos. 454, 582, October Term decided April 19, 1943.

[132]281 U. S. 233 (1930), at p. 326. See also Northern Coal & Dock Co. v. Strand, 278 U. S. 142 (1928); John Bailey Iron Wks. v. Span, 281 U. S. 222 (1930).

Since employment in shiploading is not a matter of purely local concern, subject to state regulations, certainly employment aboard petitioners' vessels in navigating those vessels is not a matter of purely local concern, and, accordingly, in any event, the latter also is beyond the scope of local state legislation and regulation.

Consistently with the above authorities, this Court, in a unanimous opinion delivered by Mr. Justice Cardozo, has denied state authority to tax the business of stevedoring because of the nature of the employment involved therein,[133] even though the employment was completely performed within the limits of the state assessing the tax.

It is submitted that regulation and taxation of the instant employment is exclusively within the power of Congress. This is so, first, because it is a matter of requiring uniformity; and, second, it is a subject of national, rather than of purely local, concern. Hence, the state act cannot be applied to it.

CONGRESS HAS PREEMPTED THE FIELD[134]

Seamen are wards of the Admiralty Courts,[135] and not of the State Unemployment Compensation Commissioners. In a recent case this Court said:[136]

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[133]Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 (1937).

[134]". . . where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application." Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 156 (1942).

[135]Lawson v. The James H. Shrigley, 50 Fed. 287 (1892), where the court pointed out that seamen "are regarded as the wards of the Court, and every shield and safeguard which the law can give is thrown around them, both by legislative enactment and judicial decision.

[136]See Southern S. S. Co. v. N. L. R. B., 316 U. S. 31 (1942) at p. 39.

> ". . . workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages and return transportation to this country if destitute abroad."

The Court could have added that federal statutes make the following provisions with respect to unemployed seamen: They are provided hospitalization at the expense of the United States.[137] A special federal fund is created for the relief of sick and disabled seamen,[138] and other federal statutes provide for their care.[139] The benefits of the Federal Old Age Pension were extended to seamen on January 1, 1940.[140] Seamen who become unemployed before the termination of their contract by reason of the loss or wreck of the vessel are entitled, not only to their wages, but to maintenance and transportation back to their port of shipment, whether stranded abroad,[141] or in a domestic port.[142] The Senate has given its advice and approval to the Treaty covering the liability of shipowners in case of sickness, injury or death of seamen, containing elaborate provisions for the care and compensation of seamen unemployed for such reasons.[143] The Senate is still considering the Draft Convention Concerning Sickness Insurance for Seamen,[144]

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[137] 24 U.S.C.A. 26, 26a.
[138] 24 U.S.C.A. 26a; 24 U.S.C.A. 2.
[139] 42 U.S.C.A. 6.
[140] 42 U.S.C.A. 409 (b)(A),(B).
[141] 46 U.S.C.A. 678, *seq.*
[142] 46 U.S.C.A. 593.
[143] See Convention # 55, International Labor Conference, 21st Session, Geneva, 1936, reported, 1938 A. M. C., Vol. 2, p. 1297.
[144] See Convention # 56, International Labor Conference, 21st Session, Geneva, 1936, reported, 1938, A. M. C., Vol. 2, p. 1322.

and will no doubt be called upon to consider the Convention Concerning Unemployment in Consequence of Shipwreck.[145]

The foregoing is but a minor portion of the federal regulations with respect to employment of seamen. Thus, federal statutes regulate their wages, hours, clothing, food, medical care and labor relations.[146] There are statutes regarding the care of the effects of deceased seamen.[147] Other statutes prevent the shanghaiing of seamen.[148] In 1936, statutes were passed governing all maritime labor relations,[149] and creating the "Maritime Labor Board,"[150] specifically charged to report "a comprehensive plan for the establishment of a permanent Federal policy for . . . the stabilization of maritime labor relations."[151] This Act was extended another year by an amendment of June 23, 1941,[152] and on December 19, 1941, the President created the Maritime (Labor) War Emergency Board to handle all matters between sea-going personnel and operators of American merchant ships.[153] Decision No. 5 thereof, provides for the payment of salaries of seamen while interned in a foreign country, or whose ships are lost, due to enemy action, pending return to the United States.[154]

Indeed, Congress considered the entire question of unemployment compensation for maritime workers at the time the Social Security Act was under advisement,[155] and

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[145]Series #8, International Labor Conference, Genoa, 1920, reported, 1938 A. M. C., Vol. 2, p. 1322.

[146]See the innumerable detailed provisions of 46 U. S. C. A., Chap. 18, as well as the Fair Labor Standards Act and the National Labor Relations Act.

[147]46 U. S. C. A. 621-628.

[148]18 U. S. C. A. 144.

[149]46 U. S. C. A. 1251, seq.

[150]*Id.*, 1257.

[151]*Id.*, 1260.

[152]See 1942 A. M. C. 151.

[153]See 1942 A. M. C. 308, seq.

[154]*Ibid.*, p. 311.

[155]See discussion by Mr. Murray W. Latimer, Chairman, Railroad Re-

expressly excluded such workers from the social security system by defining "Employment" in Title IX thereof as follows:[156]

> "The term 'employment' means any service of whatever nature performed within the United States by an employee for his employer, except:
>
> > "(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States."

Since that time, Congress has had under consideration, and has held extensive hearings on, at least two bills to establish a national system of unemployment compensation for maritime workers.[157]

In view of the foregoing federal bills, statutes, treaties and multilateral conventions affecting unemployed maritime workers, can it be said that the various states are competent to inject inconsistent and conflicting local provisions concerning unemployed seamen, and regulating employment so as to reduce maritime unemployment? And what is the effect of such conflicting provisions? To take just one obvious example, let us assume that forty deck hands signed on the dredge "Lake Fithian" in New York for eighteen months. The dredge then came to Louisiana, where she became shipwrecked within the period. To what are the forty deck hands entitled—maintenance and transportation back to New York—or Louisiana un-

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tirement Board, on H. R. 9798; Hearings before Committee on Merchant Marine and Fisheries, 76th Cong., 3d Sess., (1940) p. 2.

[156]42 U. S. C. A. § 1107(c) (3).

[157]See H. R. 9798 (76th Cong., 3d Sess.) and Hearings, *loc. cit. supra* note 155, and H. R. 5446 (77th Cong., 1st Sess.) and Hearings before Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess. (1941), on H. R. 5446.

employment compensation—or both? And if both, what is there to indicate that Congress meant to subject the shipowner to the regulation and expense incident both to maintenance and transportation, and to the state unemployment compensation system?

The federal statutes, moreover, prescribe minutely the nature and form of employment records to be kept with regard to seamen. Depending upon the type of trade in which the vessel is engaged,[158] shipping articles in a form prescribed by Congress may be executed before a shipping commissioner,[159] setting forth in detail the terms of the employment. The sale of deceased seamens' effects must be entered in the official log book by the master, and attested by the mate or one of the crew, along with a statement of the sum due the deceased as wages and the total amount of deductions.[160] Such entries must be exhibited to the shipping commissioner, who, in proper cases, issues his certificate.[161]

The statutes further provide that all wage-payments and advances shall be entered by the master in the official log book, and that an account shall be delivered to the seaman forty-eight hours before he is paid off or discharged.[162] Elaborate provision is made for mutual releases, executed before a commissioner,[163] and the discharge must be signed by the master in a form prescribed by Congress,[164] and must include "a report of the conduct, character, and qualifications of the persons discharged;

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[158] As to foreign trade, see 46 U. S. C. A. 564; as to coasting, *Ibid.*, 574.

[159] 46 U. S. C. A. 563, 564, 574. As to form, see, *id.*, 565, 713. These provisions do not apply to vessels under 50 tons burden.

[160] 46 U. S. C. A. 621.

[161] 46 U. S. C. A. 622.

[162] 46 U. S. C. A. 642, 563, 596.

[163] 46 U. S. C. A. 644.

[164] *Id.*, 713, Table "B".

or may state in such form, that he declines to give any opinion upon such particulars, or upon any of them . . ."[165]

In view of the specific, detailed and comprehensive nature of the employment records required to be kept by the federal statutes, can it possibly be said that Congress has left room for Louisiana to authorize its Unemployment Compensation Commissioner, to require of maritime employers that:[166]

> "Each employing unit shall keep true and accurate records, containing such information as the Commissioner may prescribe . . . The Commissioner or authorized representative may require from any employing unit any sworn or unsworn reports which he deems necessary for the effective administration of this Act."

Clearly, Congress has preempted the field, both of maritime employment regulation and of maritime employment records and the conflicting provisions of the Louisiana act must fall.[167]

CONGRESS HAS EXPRESSLY INDICATED THAT UNEMPLOYMENT COMPENSATION FOR MARITIME WORKERS IS A SUBJECT OF NATIONAL AND NOT OF STATE CONCERN

When Congress indicates a policy with respect to a matter over which it has plenary authority, such policy will be enforced.[168]

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[165]*Id.*, 645. The Shipping Commissioner retains a copy of the discharge. And see section 646.

[166]La. Unemployment Compensation Act, Sec. 10(g).

[167]Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942).

[168]"The question remains, whether the present tax conflicts with the Congressional policy adopted by the Acts of Congress which we have discussed." McGoldrick v. Gulf Oil Co., 309 U. S. 414, 428 (1940).

The Louisiana act is merely a part of the comprehensive plan of social security legislation sponsored by the federal government; and indeed, except for such sponsorship, state unemployment compensation is not feasible.[169] Hence, it is to the federal plan that we must look primarily to determine the rôle both of the federal and of the state governments in the social security system.[170] As said recently by this Court in the *Buckstaff Bath House* case:[171]

> "The (Social Security) Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the Federal Act; payments under the state law could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear . . . there were great practical inducements for the states to become components of a *unitary plan for unemployment relief*. . . . it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminus as possible with its own.
>
> " . . . Thus, the exclusion of federal instrumentalities from the scope of the Federal Act, *and hence from the complementary state systems*, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation. Had it been desired to exempt the equally well known class, of which petitioner is a member, *so as to save it from*

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[169]Unemployment Compensation, What and Why? (Social Security Board, 1937), p. 24, *seq.*

[170]*Ibid.*, p. 25.

[171]Buckstaff Bath House Co. vs. McKinley, 308 U. S. 358 (1939) at p. 363.

> *reciprocal state systems*, it would seem that an equally clear exception would have been made." (Emphasis supplied.)

The prohibition against a state coverage of maritime employment was recognized by practically all of the states in the adoption of their respective statutes. These statutes, with few exceptions, contain the identical exclusion with respect to officers and members of crews as does the federal act.

Perhaps the most important thing to remember in this connection is that the social security system is tentative, still experimental, and does not purport either itself to cover, or to authorize the states to cover, the entire field with respect to unemployment compensation. As stated in the President's first Message to Congress submitting the Social Security Plan, and as reiterated by him in his Message in 1939,[172] transmitting a Report of the Social Security Board to Congress, recommending changes in the Social Security Act:

> "It is overwhelmingly important to avoid any danger of permanently discrediting the sound and necessary policy of Federal legislation for economic security by attempting to apply it on too ambitious a scale before actual experience has provided guidance for the permanently safe direction of such efforts. The place of such a fundamental in our future civilization is too precious to be jeopardized now by extravagant action."

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[172]See Message from the President of the United States transmitting a Report of the Social Security Board Recommending Changes in the Social Security Act, Document #110, 76th Cong., 1st Sess. (1939) p. 3.

Having determined on local, rather than on federal, administration of the unemployment compensation aspect of social security, it was not necessary that specific authorization be given by Congress to the states to put some of the program into effect. The states already possessed the requisite police and tax power to effectuate a large part of the program. However, Congress recognized that there were important phases of our economic life beyond the reach of the state police and taxing authority. To mention but a few: employment in interstate commerce; employment by the federal government itself, or by federal agencies, instrumentalities, corporations and authorities; employment on federal property, and by national banks and other federally chartered corporations; employment in foreign embassies and consulates; and finally, employment within the admiralty and maritime jurisdiction of the United States.

It is important to note that in only one of the above phases of employment did Congress originally authorize state interference, and then only to a limited extent. With respect to employment in interstate commerce, the Congress expressly provided in the original Social Security Act:[173]

> "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce."

Both the language of, and the omissions from, the above provision are most significant. Couched in the nega-

[173] 42 U. S. C. A. 1106.

tive, it simply takes away the immunity of employment, affecting interstate commerce, from the application of state unemployment compensation laws. Congress obviously assumed that but for this provision, its plenary authority with respect to the regulation of interstate commerce would prevent state unemployment compensation from being applicable to such employment.

Moreover, Congress was not even willing to go so far as to grant the states authority to make unemployment compensation legislation applicable to all interstate commerce. Hence, a governmental instrumentality engaged in interstate commerce was not, by the above section, subjected to state unemployment compensation legislation. Similarly, a federally chartered corporation or national bank engaged in interstate commerce, though prevented from resisting the application to it of state unemployment compensation legislation on the ground of interstate commerce, could nevertheless oppose application of such laws to it as not being subject to state regulation.

And so with maritime employment—the very fact that Congress authorized state interference with interstate commerce employment, and expressly withheld authorization to the states to interfere with maritime employment, is adequate demonstration that Congress, not by silence, but by positive action, asserted its plenary authority with respect to admiralty and maritime jurisdiction.

This conclusion is strengthened by the fact that, since 1935, Congress, while withdrawing railroads from state control,[174] has conferred authority on the states to apply their unemployment compensation laws to the following

[174] 45 U. S. C. A. 363(a).

types of employment within the plenary power of Congress:[175] (1) instrumentalities of the United States (except those wholly owned or otherwise exempt); (2) national banks; and (3) persons employed on land or premises owned, held or possessed by the United States. In each instance, the grant of such authority was carefully safeguarded and qualified. But never has Congress surrendered its plenary authority over maritime employment! Indeed, the very Social Security Borad which recommended to Congress the surrender of its complete authority over the types of employments listed above,[176] at the same time, recommended that Congress not authorize state interference with maritime employment.

The considerations moving the Social Security Board to recommend, and the Congress to accept such recommendations, that maritime employment not be included in the Social Security Act, or authorized to be included by the States, were many and important. In the first place, both the Board and the Ways & Means Committee considered the constitutional obstacles insurmountable.[177] Moreover, there were important considerations of propriety,[178] expediency[179] and uncertainty.[180] As above pointed out, the

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[175]See 26 U. S. C. A. 1606.

[176]See Report, *op. cit. supra*, note 172, p. 19. See also, Hearings on Social Security Act Amendments, 1939, before House Committee on Ways and Means (76th Cong., 1st Sess.) pp. 11, 14.

[177]*Ibid.*, Report, p. 16, Hearings, pp. 12, 65. See also *Id.*, pp. 1413, 1426, 1450 *seq.*, 2325, 2327, 2471.

[178]See Hearings on Social Security Act Amendments, 1939, pp. 2471, 2488, *seq.*; Hearings on H. R. 5446, *op. cit. supra*, note 157, pp. 198, 199.

[179]For instance, the members of the House Committee on Ways and Means seem to have been definitely of the opinion that a bill, either to include maritime workers in the Social Security plan, or to provide a separate system for them, should originate in the House Committee on the Merchant Marine and Fisheries, rather than in the Committee on Ways and Means. See Hearings relative to the Social Security Act Amendments, 1939, *op. cit. supra*, note 176, pp. 1423-1424 1428 2326. Such a bill was subsequently introduced and referred to the House Committee on the Merchant Marine and Fisheries. See *supra*, note 157.

[180]See references, *infra*, note 181.

President himself had warned against "extravagant action." The Hearings on the Social Security Bill are replete with the complaints of the experts that they were without sufficient information, without statistics, and without sufficient opportunity to study, the practices, habits and problems of maritime employment.[181]

In this respect, the federal government stands in a very delicate relation to the states in its responsibility for the administration of the joint aspects of the social security plan. As sponsor, the national government must assume responsibility for its proper operation, for guidance of the states, and for not permitting the states to jeopardize the solvency of their funds by "extravagant action;" for insolvency would obviously completely discredit the entire system. This was certainly one of the considerations inducing the Congress not to authorize the States to extend their unemployment compensation systems to include maritime unemployment.

Under state plans, including Louisiana's, unemployment compensation is payable, ordinarily, after a waiting period of only two weeks, and the waiting period can never be extended beyond nine weeks, even if the recipient is discharged for cause.[182] At committee Hearings it was developed, however, that (except in wartime) maritime unemployment ran between 15 and 35 per cent.[183] It further

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[181]See Hearings on Social Security Act Amendments, 1939, *op. cit. supra*, note 176; Testimony of Mr. George E. Bigge, Commissioner, Social Security Board, p. 2490. Hearings on H. R. 5446, *op. cit. supra*, note 157; Testimony of Mr. Murray W. Latimer, Chairman, Railroad Retirement Board, pp. 5, 21.

[182]La. Act 164 of 1938, Sec. 4, *infra* appendix D, p. 61.

[183]See Testimony of Mr. George E. Bigge, *op. cit. supra*, note 181, at p. 2488; also testimony of Mr. Latimer, *op. cit. supra*, note 181 at p. 22, *passim*.

developed that the custom in maritime employment to hire through "hiring halls" would place an exhorbitant drain on compensation reserves. With reference to the effect of this custom on unemployment compensation, Mr. George E. Bigge, Commissioner, Social Security Board, an expert on maritime employment, testified:[184]

> "If a seaman becomes unemployed . . .he files his card at the hiring hall . . . His name is put at the bottom of the list of those who have indicated that they want jobs, and he must wait his turn until his name comes to the top of the list. . . . It means . . . that they would all . . . probably qualify for benefits when again they become unemployed.
>
> "This same rotational system means that most of those who do become unemployed are unemployed for a long enough time so that they would draw benefits. They have to wait their turn until others have had a chance to get jobs. As a result the unemployment that does exist in the industry will probably place a larger drain upon the fund than the same total unemployment would in most other industries, because much of the unemployment in other industries would not be compensated; first, because some of the people would never be eligible; second, because some of the people would draw the benefits as long as they are eligible, and then still be unemployed because they could not get a job, and they would not be compensated for this second part of their period of unemployment.
>
> "So the economic characteristics of the industry are such that it does present rather serious

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[184] *Op. cit. supra*, note 181, at p. 2488-2489.

> problems from the point of view of unemployment compensation . . . Those are the economic characteristics that, I think, need to be taken into account in setting up any kind of unemployment insurance program for this industry."

These economic characteristics were fully taken into account by the House Committee on the Merchant Marine and Fisheries, in considering H. R. 5446 which creates an unemployment compensation system for maritime workers. This bill places a 6 per cent tax instead of the present 3 per cent tax which applies to other industries.[185] This increase is in part justified by the fact that the maritime industry has not yet been called upon to contribute unemployment compensation taxes.[186] The bill contains many other deviations from the Social Security Act made necessary by the difference in the nature of maritime employment practices, and applicable federal regulations.[187]

The importance of this for present purposes is that it shows clearly that Congress carefully considered the problem of extending coverage to maritime employment, and after such careful consideration, expressly refused to do so.

In its Report to the House Committee on the Merchant Marine & Fisheries, the Social Security Board warned against attempting to grant authority over maritime employment to the states. The Board said:[188]

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[185]H. R. 5446, *op. cit. supra*, note 157, Sec. 8(b).

[186]See Testimony, Mr. Latimer, *op. cit. supra*, note 200, at pp. 15, 17.

[187]See, generally, H. R. 5446, and Memorandum submitted by Mr. Altmeyer, Chairman, Social Security Board, on "Questions to be Settled in Placing Seamen Under Social Security Act," *op. cit. supra*, note 176, at pp. 2471, 2472.

[188]See Hearings, *op. cit. supra*, note 157, p. 198. For the weight to be given such administrative determinations, see Davis v. Department of Labor & Industries, 63 S. Ct. 225 (1942).

"Under the Constitution it is impossible to confer upon the States jurisdiction over maritime employment to the extent necessary to meet the needs of unemployment compensation. Therefore, *in order to afford such protection to seamen, it would be necessary to pass a Federal act.* The Board recommends that such an act be passed covering all maritime employment which it is not possible or practicable to bring under state laws . . ." (Emphasis supplied.)

* * *

The Board also said:[188a]

" . . . But more important than this fact is the fact that any allocation of services among several unemployment compensation systems automatically makes it more difficult for an individual to qualify for benefits and may result in the loss of some or all of the individual's benefit rights. H. R. 5446 contains . . . authority to the Railroad Retirement Board to minimize these possibilities but it must be noted that in order to do so effectively arrangements must be made with 51 separate State agencies and appropriate authority must be obtained from the legislature of 51 jurisdictions."

Obviously in addition to constitutional prohibitions, one of the reasons for refusing so to authorize the states to enter the field of maritime unemployment was the fear of jeopardizing the solvency of the entire Social Security System by authorizing such a substantial drain, the full extent of which is not even known, on state resources, which are supported normally by a pay roll tax of only 2.7

[188a] *Op. cit. supra*, note 188.

per cent, as against the 6 per cent tax recommended by the experts as necessary to support unemployment compensation in the maritime industry.

As heretofore pointed out, Congress has indicated by positive action that maritime employment is not a proper subject for the application of state unemployment compensation legislation by exempting from the definition of "employment" in Title IX of the Social Security Act[189]

> "services performed as an officer or member of the crew of a vessel on the navigable waters of the United States."

The district court dismissed this obvious expression of Congressional intent by saying:

> "nor can it be reasonably contended that the state legislator was held to a punctilious setting of foot nowhere but in the tracks of Congress . . ." (R. 44)

But this misses the point of the exception, ignores the *Buckstaff Bath House* case,[190] and fails to explain why, in Title II of the same Social Security Act, where *Federal* as opposed to *State*, administration of the "Old Age and Survivors Insurance Benefits" plan is contemplated, the same term—"employment"—is defined so as to *include:*

> ". . . service performed . . . on or in connection with an American vessel."

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[189] 42 U. S. C. A. 1107(c) (3); Parker v. Motor Boat Sales, Inc., 314 U. S. 244 (1941). See also: 26 U. S. C. A. 1607(c) (4).

[190] *Loc. cit. supra*, note 136.

It is obvious that Congress included seamen under the Old Age provisions of the Act because that is federally administered, and excluded them under the other because it is state administered.

The Circuit Court relied upon the badly reasoned opinions of two state courts as authority for its decision on this question. In the New York case,[191] presently on appeal to this Court,[192] the Court interpreted the provision of the Federal Social Security Act permitting extension of state unemployment compensation legislation to interstate commerce to authorize like extension to admiralty matters,[193] an entirely inadmissible extension of the provision, in no way warranted by a history of the Act, as pointed out above.

The New Jersey case involved employment exclusively within the territorial limits of New Jersey, in small surf boats, "more properly within the category of local fishermen and not members of a crew."[194] In the instant case, as stipulated, the vessels frequently, though not customarily between ports, operate outside Louisiana, across the boundaries thereof, and in foreign countries, and employment thereon is indisputably maritime in nature.

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[191]Claim of Cassaretakis, 289 N. Y. 119, 44 N. E. (2d) 391 (1942).

[192]No. 813.

[193]The Court said (44 N. E. (2d) at p. 395): ". . . by section 1606(a) of the Federal Tax Act, 26 U. S. C. A. Int. Rev. Code, Sec. 1606(a), the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in Perkins v. Pennsylvania, 314 U. S. 586, affirming 342 Pa. 529, 21 A. 2d 45, the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania Unemployment Insurance Law, 43 P. S. Sec. 751 *et seq.*, to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate."

[194]Shore Fishery, Inc. v. Board of Review, 127 N. J. L. 87, 21 Atl. (2d) 634 (1941) at p. 637.

Not only has the Congress completely occupied the field of the regulation both of maritime employment and of maritime unemployment to such an extent as to make impossible inconsistent state legislation, but the Congress has expressly declared that the field of maritime unemployment compensation is one which, in the exercise of its plenary power, Congress has reserved to itself, and withheld from the states.

CONCLUSION

It is respectfully submitted:

1. That the dredges and appurtenant craft involved are "vessels" and the employees thereof are "officers and members of the crews," within the admiralty and maritime jurisdictions of the United States;

2. That the state statute, when sought to be applied to such maritime employment, is essentially state regulation and taxation, of essential incidents of the exercise of petitioners licenses granted by the United States to engage in the coasting trade;

3. That the state statute, in purpose and in effect, is a comprehensive system of employment regulation of which the tax feature is an integral part, and that, as such, when sought to be applied to the instant maritime employment, it invades a field in which Congress has exclusive jurisdiction;

4. That Congress expressly and by necessary implication has excluded state unemployment compensation legislation and taxation with regard to maritime employment,

as much because of constitutional limitations on state interference in admiralty and maritime matters as in the interest of protecting state unemployment compensation funds from possible insolvency as a result of exhorbitant drains on reserves in paying benefits for maritime unemployment; and

5. That, accordingly, the Louisiana Unemployment Compensation Act, in so far as it seeks to include within the term "employment," services performed by petitioners' maritime employees while operating petitioners' vessels on the navigable waters of the United States within the State of Louisiana, is unconstitutional, null and void, and petitioners are entitled to the declaratory relief prayed for.

Respectfully submitted,

R. EMMETT KERRIGAN,
JAMES J. MORRISON,
Attorneys for Appellants.

DEUTSCH, KERRIGAN & STILES
RYAN, CONDON & LIVINGSTON,
Of Counsel.

APPENDIX A

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:RR
RFW

JAN 9 1937

Standard Dredging Company,
80 Broad Street,
New York, New York.

Sirs:

Reference is made to your letter of November 23, 1936, transmitting copies of Bureau letters dated August 21, 1936 and October 22, 1936, adressed to Mr. Clarence W. DeKnight, Hibb Building, Washington, D. C., and to The National Association of River and Harbor Contractors, 15 Park Row, New York, New York, and requesting further consideration of Bureau ruling holding that dredges are not vessels within the meaning of section 811(b)(5) and section 907(c)(3) of the Social Security Act. The case has been reconsidered.

This office now holds that dredges which are intended and adapted for navigation and transportation by water of their crews, supplies and machinery, from point to point, in carrying on the work of deepening and removing ob-

structions from channels and harbors in aid of navigation and commerce are vessels within the meaning of section 811,b) (5) and section 907(c) (3) of the Act. Where such dredges are operated in navigable waters of the United States, the services performed by the officers and members of the crew come withing the excepting provisions of section 907(c) (3) and the wages payable to the employees on account of such services should not be included in the computation of wages for the purpose of determing the employer's tax. If such dredges are documented under the laws of the United States, the services of the officers and members of the crew come within the excepting provisions of section 811(b) (5) of the Act.

Respectfully,

(Sgd) Sherwood
Acting Deputy Commissioner.

APPENDIX B

Form No. 7802—Jan. 1922

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU,
Comptroller General U. S.

Washington, D. C.

NOTICE OF ADJUSTMENT OF CLAIM FOR ABATEMENT

Claim No. 439730 District of Louisiana

Schedule No. EmT:FICA:A 14848

Standard Dredging Corporation (New York)
on behalf of the United Dredging Company,
1402 Whitney Building,
New Orleans, Louisiana.

Sirs:

Your claim for abatement of employers' and employees' taxes and interest assessed under Title VIII of the Social Security Act for the quarters ended June 30, September 30, and December 31, 1938, has been adjusted as shown below.

Claimed $5,527.77 Allowed $5,527.77 Rejected $.....

The claim is allowed in full for the reason that the amount thereof represents taxes and interest erroneously assessed with respect to remuneration for services which are excepted from "employment" by reason of the provisions of Section 811(b)(5) of the Social Security Act.

Your account with the Collector of Internal Revenue will be adjusted accordingly.

In case of a rejected amount, payment should be made to the Collector of Internal Revenue at_____ at once, together with interest which has accrued.

Respectfully,

(Sgd) Goe. J. Schoeneman
Deputy Commissioner

WMN:HAH

APPENDIX C

ACT 11 of 1940

Section 3. *Benefit eligibility conditions.* An unemployed individual shall be eligible to receive benefts with respect to any week only if the administrator finds that—

(a) He has made a claim for benefits in accordance with the provisions of section 5(a) of this act.

(b) He has registered for work at, and thereafter has continued to report at, an employment office in accordance with such regulations as the administrator may prescribe, except that the administrator may, by regulation, waive or alter either or both of the requirements of this subsection as to such types of cases or situations with respect to which he finds that compliance with such requirements would be oppressive, or would be inconsistent with the purposes of this act; provided that no such regulation shall conflict with section 2(a) of this act.

(c) He is able to work, and is available for work.

(d) He has been unemployed for a waiting period of two weeks. Such weeks of unemployment need not be consecutive. No week shall be counted as a week of unemployment for the purpose of this subsection—

(1) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits, provided that this requirement shall not interrupt the payment of benefits for consecutive weeks of unemployment, and provided further that the week

or the two consecutive weeks immediately preceding a benefit year, if part of one uninterrupted period of unemployment which continues into such benefit year, shall be deemed (for the purpose of this subsection only) to be within such benefit year as well as within the preceding year.

(2) If benefits have been paid with respect thereto.

(3) Unless the individual was eligible for benefits with respect thereto as provided in sections 3 and 4 of this act, except for the requirements of this subsection and of subsection (e) of section 4.

(e) He has during his base period been paid wages for insured work equal to not less than twenty times his weekly benefit amount. For the purposes of this subsection wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18(f) or section 7(c) with respect to becoming an employer. (Acts 1936, No. 97, § 3; 1938, No. 164, § 2; 1940, No. 11, § 3).

APPENDIX D

ACT 11 of 1940

Section 4. *Disqualification for benefits*—An individual shall not be eligible for benefits—

(a) For the week in which he left his work voluntarily without good cause, if so found by the administrator, and for not more than the six weeks, which immediately follow such week, as determined by the administrator according to the circumstances in each case.

(b) For the week in which he has been discharged for misconduct connected with his work if so found by the administrator, and for not more than the six weeks which immediately follow such week, as determined by the administrator in each case according to the seriousness of the misconduct.

(c) If the administrator finds that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the administrator, or to accept suitable work when offered him, or to return to his customary self-employment (if any) when so directed by the administrator. Such [in] eligibility shall continue for the weeks in which such failure occurred and for not more than the six weeks which immediately follow such week as determined by the administrator according to the circumstances in such case.

(1) In determining whether or not any work is suitable for an individual, the administrator shall consider among other factors the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of

unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this act, no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed.

Provided that such disqualification shall not exceed the three weeks immediately following the beginning of such dispute; and provided further that this subsection shall not apply if it is shown to the satisfaction of the administrator (1) he is not participating in or directly interested in the labor dispute which caused his unemployment, and (2) he does not belong to a grade or class of workers of which immediately before the commencement of the dispute there were members employed at the premises at which the dispute occurs, any of whom are participating in or directly interested in the dispute.

Provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

(e) For any week with respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States, provided that if the appropriate agency of such other state or of the United States finally determines that he is not entitled to such unemployment benefits, this disqualification shall not apply. (Acts 1936, No. 97, § 4; 1938, No. 164, § 2; 1940, No. 11, §4.)

APPENDIX E

ACT 11 of 1940

Section 13. *Collection of contributions.*—

(a) *Interest on Past-due Contributions.* If contributions are not paid on the date on which they are due and payable as prescribed by the administrator, the whole or part thereof remaining unpaid shall bear interest at the rate of one per centum per month from and after such date until payment is received by the administrator, and shall be further subject to a penalty of ten per centum, (10%) attorney's fees on both contributions and interest. In computing interest for any period less than a full month, the rate shall be one-tenth (1/10) of one per centum, for each three-day period or part thereof. The date as of which payment of contributions, if mailed, is deemed to have been received may be determined by such regulations as the administrator may prescribe. Interest and penalties collected pursuant to this subsection shall be paid into the unemployment compensation fund.

(b) Collection. (1) If, after due notice, any employer defaults in any payment of contributions, or interest thereon, the amount may be collected by civil action in the name of the administrator, and the employer adjudged in default shall pay the cost of such action, interest and attorney's fees. Civil action brought under this section to collect contributions or interest, or attorney's fees thereon, from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other actions except petitions for judicial review under this act and cases arising under the workmen's compensation laws of this state. Such action shall be by rule to show cause within five (5) days why payments should not be made, and may be tried out of term time and in chambers.

(2) If any employer fails to file a report or return required by the administrator for the determination of contributions, the administrator may make such reports or returns, or cause same to be made, and determine the contributions payable, on the basis of such information as he may be able to obtain, and shall collect the contributions so determined, together with any interest, attorney's fees, and other penalties thereon due under this act.

(3) If any employer defaults in any payment of contributions or interest, attorney's fees and other penalties thereon, then the administrator or his duly authorized representatives may take in any manner feasible, and cause to be recorded in the mortgage records of any parish in which such employer is engaged in business and/or owns real or personal property, a statement, under oath showing the amount of the contributions, interest and penalties in default; which statement, when filed for record, shall operate as a first lien, privilege, and mortgage on all of the real and personal property of the employer from the date of such filing only, and shall not affect liens, privileges, chattel mortgages, or mortgages already affecting or burdening such property at the date of such filing; and the property of such employer shall be subject to seizure and sale for the payment of such contributions, interest, attorney's fees, and other penalties according to the preference and rank of said lien, privilege and mortgage securing their payment.

(4) In any proceedings brought by the administrator for the collection of contributions, the burden of proof upon all questions of fact shall be upon the defendant, but only as to those facts which the administrator, his representative or attorney, shall swear are to the best of his knowledge or belief true.

(5) The administrator shall not be required to furnish any court bond, nor to make a deposit for or pay any costs of court in any legal proceedings, nor to pay any costs

or fees in connection with the recordation in the mortgage records of any parish of a sworn statement showing the amount of contributions, interest and penalties in default by an employer. No clerk of any court, sheriff, recorder of mortgages, or any other public official shall fail or refuse to perform any service in connection with proceedings brought by the administrator on the ground that costs have not been advanced or guaranteed, nor shall they be entitled to charge for any certified copies of any document which they shall be required to furnish on request of the administrator.

(c) *Priorities under Legal Dissolution or Distributions.* In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, liquidation, assignment for the benefit of creditors, adjudicated insolvency, composition, or similar proceedings, contributions then or thereafter due shall be paid in full prior to all other claims, except taxes, and claims for wages of not more than $250.00 to each claimant earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition under the Federal Bankruptcy Act of 1898 (3 F. C. A., Tit. 11, § 1-303), as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section 64(b) of that act (U. S. C., tit. 11, sec. 104(b); 3 F. C. A., Tit. 11, § 104(b).

(d) Dissolution. The secretary of state shall withhold the issuance of any certificate of dissolution of any corporation organized under the laws of this state, or any certificate of withdrawal of any corporation organized under the laws of another state and admitted to do business in this state, until the receipt of a certificate from the administrator to the effect that all contributions due from such corporation as an employer have been paid, or that such corporation is not subject to contributions hereunder.

(e) Payment of Contribution before Discharge or Dissolution. No liquidator, receiver, or trustee shall deliver possession of any property of an employing unit until contribution due have (has) been paid the administrator; otherwise, they, together with their sureties, shall be personally liable therefor, with interest and costs. Nor shall any partnership be dissolved until contribution due by the partnership is paid; otherwise the partners shall be liable in solido therefor, with interest, penalties, and costs.

(f) Successive Employers Liability. Any person, group of individuals, partnership, or employing unit which acquires the organization, trade or business, or substantially all the assets thereof, from an employer shall notify the administrator in writing by registered mail not later than five days prior to the acquisition. Unless such notice is given, such acquisition shall be void as against the administrator, if, at the time of the acquisition, any contributions are due and unpaid by the previous employer; and the administrator shall have the right to proceed against such employer either in personam or in rem, and the assets so acquired shall be subject to attachment for such debt.

(g) Refunds and Adjustments. (1) If not later than three years after the date on which any contributions or interest or penalties thereon became due, an employing unit which has paid such contributions or interest or penalties thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment can not be made, and the administrator shall determine that such contributions or interest or penalties or any portion thereof were erroneously collected, the administrator shall allow such employing unit to make an adjustment thereof, without paying interest upon the same, in connection with subsequent contribution payments by it, or if such adjustment can not be made, the administrator shall refund said amount, without interest upon same from the

unemployment compensation fund. For like cause and within the said period, adjustments or refund may be so made on the administrator's own initiative.

(2) Any adjustment made with respect to contributions from any individual employed by an employing unit, either upon the application of the employing unit of such individual, the individual, or by the administrator on his own initiative, within the period prescribed in paragraph (1) of ths subsection, shall be deductible from the amount of subsequent contributions required of such individual, if any; or if such adjustment can not be made, the administrator shall refund said amount to such individual, without interest, from the fund. (Acts 1936, No. 97, § 13; 1938, No. 164, § 2; 1940, No. 11, § 9; 1942, No. 133, § 1.)

SUPREME COURT OF THE UNITED STATES.

No. 849.—October Term, 1942.

Great Lakes Dredge & Dock Company, et al., Petitioners,
vs.
C. C. Huffman, Administrator, Division of Employment Security, Louisiana Department of Labor, etc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 24, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioners brought this suit in the district court against respondent, a state officer charged with the administration and enforcement of the Louisiana Unemployment Compensation Law (Act 97 of 1936, as amended by Act 164 of 1938, Act 16 of the First Extraordinary Session of 1940, and Acts 10 and 11 of 1940). The complaint alleges that petitioners have numerous classes of employees engaged in the navigation and operation of dredges and pile drivers and in the operation of quarter boats, tugs, launches, barges and other vessels, all used in deepening, dredging, extending and otherwise improving channels underlying the navigable waters of the state; and that the tax or contribution to the state unemployment insurance fund which the state law would exact from each of petitioners exceeded, when the suit was brought, the sum of $3,000. The relief prayed is a declaratory judgment that the state law as applied to petitioners and their employees is unconstitutional and void.

After a trial the district court held the statute applicable to petitioners and their employees and, as applied to them, a valid exercise of state power. 43 F. Supp. 981. The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law. *Metropolitan Co.* v. *Kaw Valley District*, 223 U. S. 519, 523; *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135; *Clark* v. *Williard*, 292 U. S. 112, 118; *American Propeller Co.* v. *United States*, 300 U. S. 475, 479-80. So interpreted it rests wholly on

the court's declaration that the statute applied to petitioners is constitutional; it is thus in effect a declaratory judgment.

The Court of Appeals for the Fifth Circuit affirmed, 134 F. 2d 213, holding that the statute, in exacting from employers contributions to the state unemployment compensation fund, is a valid exercise of the state taxing power (see *Steward Machine Co. v. Davis,* 301 U. S. 548; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495); that the application of the Act to petitioners would not interfere with any characteristic feature of the general maritime law in its interstate and international aspects so as to fall under the ban of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and cases following it; and that the Federal Social Security Act, 26 U. S. C. § 1607(c)(4), by exempting from its operation officers and crews of vessels, has not "preempted the field" or otherwise precluded the state from applying its law with respect to the employees in question.

Because of the public importance of the questions decided, we granted certiorari, 318 U. S. —, and set the case for argument with No. 722, *Standard Dredging Corporation* v. *Miller,* and No. 723, *International Elevating Co.* v. *Miller,* which are here on appeal. In our order granting the writ, we requested counsel "to discuss in their briefs and on oral argument the question whether the declaratory judgment procedure can be appropriately used in this case where the complaint seeks a judgment against a state officer to prevent enforcement of a state statute".

The state act, as the court below held, exacts of employers payments into the state unemployment insurance fund, in the nature of an excise tax upon the exercise of the right or privilege of employing individuals and measured by a percentage of the wages paid. See *Carmichael* v. *Southern Coal & Coke Co., supra.* Petitioners have challenged the state's right to collect the tax, and have interposed, as a barrier to the collection, the present suit in the federal court for a declaratory judgment. The district court, as we have indicated, has in substance given a declaratory judgment, which the Circuit Court of Appeals has sustained. Save for that purpose those courts had no occasion to entertain the suit, or pronounce any judgment in it. Neither court, nor any of the parties, has questioned the sufficiency of the pleadings to present a case for a declaratory judgment. Without raising that issue here we pass at once to the question, submitted to counsel, whether the declaratory judgment procedure may be appropriately resorted to in the circumstances of this case.

In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision. By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto" shall pay the tax to the appropriate state officer and file suit for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded.

This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. *Matthews* v. *Rodgers*, 284 U. S. 521. This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. *Stratton* v. *St. L. S. W. Ry.*, 284 U. S. 530, 533-34; *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 69. On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (*United States* v. *Dern*, 289 U. S. 352, 359-360; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 549-53), should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See *Pennsylvania* v. *Williams*, 294 U. S. 176, 185, and cases cited.

It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved". *Matthews* v. *Rodgers, supra,* 525-26.

Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially where the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

Congress recognized and gave sanction to this practice of federal equity courts by the Act of August 21, 1937, 50 Stat. 738, enacted as an amendment to Section 24 of the Judicial Code, 28 U. S. C. § 41(1). This provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state." The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

It is true that the Act of Congress speaks only of suits "to enjoin, suspend, or restrain the assessment, levy, or collection of any tax" imposed by state law, and that the declaratory judg-

ment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies, both at law and in equity, which the Judiciary Acts had already conferred. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227. Thus the Federal Declaratory Judgments Act (Act of June 14, 1934, 48 Stat. 955, as amended, 28 U. S. C. § 400) provides in § 1 that a declaration of rights may be awarded although no further relief be asked, and in § 2 that "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper".

The jurisdiction of the district court in the present suit, praying an adjudication of rights in anticipation of their threatened infringement, is analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 263. Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles. The Senate committee report on the bill pointed out that this Court could, in the exercise of its equity power, make rules governing the declaratory judgment procedure. S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6. And the House report declared that "large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure". H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2;

and see *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494; Borchard, Declaratory *Judgments* (2d ed.) p. 312.

The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

The Act of August 21, 1937, was predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid. See S. Rep. No. 1035, 75th Cong., 1st Sess.; H. R. Rep. No. 1503, 75th Cong., 1st Sess. Even though the statutory command be deemed restricted to prohibition of injunctions restraining collection of state taxes, its enactment is hardly an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion.

For like reasons, we think it plain also that the enactment of the Act of August 30, 1935, 49 Stat. 1027, 28 U. S. C. § 400(1), which excluded from the operation of the Declaratory Judgments Act all cases involving federal taxes, cannot be taken to deprive the courts of their discretionary authority to withhold declaratory relief in other appropriate cases. This amendment was passed merely for the purpose of "making it clear" that the Declaratory Judgments Act would not permit "a radical departure from the long-continued policy of Congress" to require prompt payment of federal taxes. See S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11; H. R. Rep. No. 1885, 74th Cong., 1st Sess., p. 13.

The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits.

Affirmed.